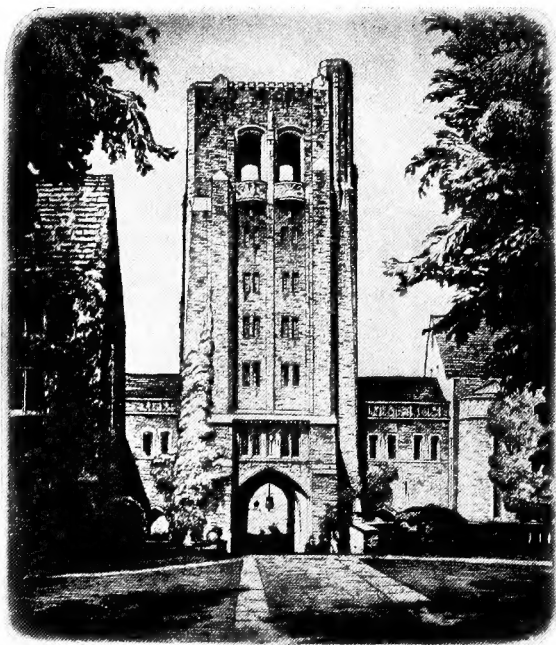




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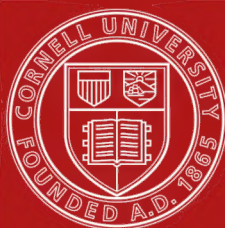
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A TREATISE  
ON THE  
RIGHTS, REMEDIES AND LIABILITIES  
OF  
SURETIES AND GUARANTORS,  
AND  
THE APPLICATION OF THE PRINCIPLES OF SURETYSHIP  
TO PERSONS OTHER THAN SURETIES,  
AND TO  
PROPERTY LIABLE AS SURETY FOR THE PAYMENT OF MONEY.

By  
EDWIN BAYLIES,  
COUNSELLOR AT LAW.

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NEW YORK:  
BAKER, VOORHIS & CO., PUBLISHERS,  
No. 66 NASSAU STREET.  
1881.

*M10298.*

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No. 25 Park Row, New York.



## PREFACE.

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OWING to the embarrassment of all business communities during the past few years, and the distrust engendered by a period of financial distress, contracts in the nature of warranties of the solvency of others, and agreements to answer for the defaults of others, have been brought into unnatural prominence in commercial transactions. As a natural result, questions involving the laws of guaranty and suretyship have lately arisen with unusual frequency, and have demanded from the courts a careful re-examination of the principles underlying that law and the decisions upon which that law was based. As the result of this examination, questions, before undetermined or in doubt, have been determined and settled; decisions of doubtful authority have been limited or overruled; and doctrines before resting in the *dicta* of the judges have in many instances been expressly re-affirmed and established by authoritative decisions. The courts, too, have in many cases returned to the theories of the old courts of equity, and hold that the rights of sureties and guarantors are in many instances mere equities, to be regulated, redressed, and determined by the application of equitable principles, and have repudiated the more modern theory of the common law, that such rights rest in implied contract, and are to be measured and determined by the rigid rules of law. The effect of the return to the original theory is to make important changes in the rules of evidence in actions brought to enforce these equitable rights in courts having both legal and equitable jurisdiction, and to materially affect the decisions of those courts as to the existence even of the right sought to be inferred. The courts, too, have extended the application

of the principles of suretyship to other contracts; and have measured the rights, liabilities, and obligations of the contracting parties by the law governing the relation of principal and surety. Many questions, too, pertaining to pure suretyships, which before were uncertain, have been made certain, in some States, by express statutes. These changes in the law of guaranty and suretyship, and the number and importance of the late decisions involving that law, are the writer's apology for the publication of the present volume.

The preparation of this work was commenced in the belief that a volume which should present clearly the rights, remedies, and liabilities of guarantors and sureties, as declared and defined by the recent statutes and decisions, would be of use to the law student in his study of elementary principles and to the practitioner in search of authorities. Acting under this belief, the writer has endeavored to present, in these pages, a statement of the law of guaranty and suretyship as it is, in a text unburdened by the recital of facts of particular cases, and to incorporate in foot-notes so much of facts and explanatory matter as he deemed useful in illustration of the principles stated in the text. He has also included in the foot-notes decisions of the courts of all the States and Territories having printed volumes of reports, as well as numerous decisions of the courts of the United States and England. It is not claimed that this book contains all the cases bearing upon the law of guaranty and suretyship, nor that other cases could not have been cited with advantage. But it is believed that in the more than three thousand cases cited, enough have been collected to give the current of authority, and to give to the practitioner in each State enough of the decisions of the courts of his own State to point out what may be peculiar to that State, if any peculiarity in fact exists. In the collection of authorities, care has been taken to select such late cases as contain an exhaustive discussion of mooted questions or an elaborate review of conflicting decisions. Many of these cases are to be found in the "Amer-

ican Reports," and to those who do not have access to the reports of all the States, the many references to that series in this volume will be a welcome feature.

That mistakes and errors will be found in these pages, is more than possible; that the work will not supply the missing link in legal literature usually characterized as "a long-felt want," is more than probable; but the work, such as it is, with all its defects, and without apology, is offered, though not without hesitation, to the consideration of a book-burdened yet ever indulgent profession, with the hope that it may be found worthy of a place in the working library.

E. B.

JOHNSTOWN, N. Y., May, 1881.



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THE  
RIGHTS, REMEDIES AND LIABILITIES  
OF  
SURETIES AND GUARANTORS.

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CHAPTER I.

NATURE OF CONTRACTS OF GUARANTY AND SURETYSHIP,  
AND WHEREIN THEY DIFFER.

- Section 1.—Nature, definition and distinctive features
- 2.—Continuing and non-continuing guaranties.
  - 3.—Absolute and conditional guaranties and offers of guaranty.
  - 4.—Letters of credit.
  - 5.—Requests and expressions of confidence.
  - 6.—How far negotiable or assignable.
  - 7.—Guaranties of payment and collection.
  - 8.—Distinction between a guaranty and an indorsement.
  - 9.—Implied warranty of the principal obligation.
  - 10.—Guaranties against loss and contracts for indemnity.
  - 11.—Distinction between a guaranty of payment and a new note.
  - 12.—Statutory bonds and undertakings.

SECTION I.—*Nature, definition and distinctive features.*

In attempting a discussion of the law relating to contracts of guaranty and suretyship, a difficulty presents itself at the outset in respect to the definition of the terms employed to distinguish the two classes of contracts. In fact, it is impossible to frame a definition of either term which will clearly distinguish the one contract from the other, and still be in harmony with the dicta in the many cases in which courts have attempted, by the application of some general rule, to bring a contract which might equally well be classed with either

guaranties or contracts of suretyship, within one class or the other. Nor does the difficulty end here, for, after a line of distinction has been drawn between these two contracts, a similar difficulty may present itself in relation to other analogous contracts.

Guaranties of commercial paper bear some analogy to indorsements. In fact, in respect to the technical distinctions, as to legal character and effect, between the contract of a surety, guarantor, maker or indorser of a promissory note, there is so much nicety of refinement as often to lead to the greatest uncertainty as to the real nature of the distinctions, and the principles upon which they are based. In many instances the shades of legal difference between guarantors, sureties and indorsers are so subtle and readily blended, that it is almost impossible to satisfactorily discriminate between them; and, in some cases, the question whether a person is a maker, guarantor or surety of a promissory note, has been one of doubt and difficulty, and almost incapable of solution upon any clearly defined and well-settled principles.<sup>1</sup> It is not strange, therefore, that, as has been asserted by a learned judge, there has been considerable loose writing upon the subjects of guaranty and suretyship, nor that the terms have been confounded throughout, and used interchangeably as meaning the same thing.<sup>2</sup>

The term "guaranty" has been defined as a promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of some person who, in the first instance, is liable for such payment or performance;<sup>3</sup> as an engagement to pay in default of solvency in the debtor, provided due diligence be used

<sup>1</sup> *Monson v. Drakely*, 40 Conn. 552; S. C. 16 Am. R. 74.

<sup>2</sup> *McMillan v. Bull's Head Bank*, 32 Ind. 11; S. C. 2 Am. R. 323.

<sup>3</sup> *Gallagher v. Nichols*, 60 N. Y. 438; *Dole v. Young*, 24 Pick. 250, 252; *Fell on Guar. & Suretyship*, 1; 3 Kent's Comm. 121.

to obtain payment from him ;<sup>1</sup> as an undertaking to answer for another's liability, and collateral thereto ; and, in a commercial and legal sense, as an undertaking by one person to be answerable for the payment of a debt, or the due performance of a contract or duty by another who himself remains liable to pay or perform the same.<sup>2</sup> The undertaking may relate to a prior debt, contract or duty, or to a future one.

The contract of a surety corresponds with that of a guarantor in many respects, and yet may differ from it in important particulars. A contract of suretyship may create a direct liability to the creditor for the performance of a certain act by the principal debtor ; while a contract of guaranty may create a liability only for the ability of the debtor to perform the act. This is exemplified in the contract of a surety for the payment, and the contract of a guarantor for the collectibility of a promissory note. In the contract of suretyship, the surety assumes to perform the contract of the principal debtor, if he should not ; and in the contract of guaranty, the guarantor undertakes that his principal can perform, and that he will be able to do so. From the nature of the former contract, the undertaking is immediate and direct that the act shall be done which, if not done, makes the surety responsible at once ; but, from the nature of the latter contract, the liability of the guarantor is dependent on the non-ability or insolvency of the principal.<sup>3</sup>

The distinction between the ordinary contract of a

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<sup>1</sup> *Brown v. Brooks*, 1 Casey, 210 ; *Reigart v. White*, 52 Penn St. 440 ; and see *Woods v. Sherman*, 71 Penn. St. 104.

<sup>2</sup> *Winchell v. Doty*, 15 Hun, 1 ; Story on Prom. Notes, § 457.

<sup>3</sup> See *Brown v. Brooks*, 1 Casey, 210 ; *Reigart v. White*, 52 Penn. St. 440 ; *Woods v. Sherman*, 71 Penn. St. 104 ; *Stitgreaves v. Griffith*, 14 Alb. Law J. 136.

#### 4 NATURE, DEFINITION AND DISTINCTIVE FEATURES.

surety to a note, and that of a guarantor of its payment, is not so broad as in the illustration above given. But, in the latter case, the two contracts, although entered into for the common purpose of securing the payment of the note at its maturity, do not create the same liability. The contract of a surety and the contract of a guarantor, although identical in purpose, are never identical in their nature, or in respect to the liability created. A surety is bound with his principal as an original promisor. He is a debtor from the beginning, and must see that the debt is paid. He is held ordinarily to know every default of his principal, and cannot protect himself by the mere indulgence of the creditor, nor by want of notice of the default of the principal, however much such indulgence or want of notice may in fact injure him. Being bound with the principal, his obligation to pay is equally absolute.<sup>1</sup> On the other hand, the contract of a guarantor is his own separate contract, it is in the nature of a warranty by him, that the thing guaranteed to be done by the principal, shall be done, and not merely an engagement jointly with the principal to do the thing. A guarantor, not being a joint contractor with the principal, is not bound to do what the principal has contracted to do, like a surety, but only to answer for the consequences of the default of the principal. The original contract of his principal is not his contract, and he cannot be sued

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<sup>1</sup> The doctrine of the text, while applicable to ordinary contracts of suretyship between individuals, cannot, perhaps, be applied in its full extent to contracts with the State; nor can the words "mere indulgence" be extended to an indulgence secured by a binding contract between individuals. As will be shown hereafter, a creditor may, by entering into a binding contract with a debtor for an extension of time, release the surety; and the State may, by the passage of a law increasing the time within which an act is to be performed for which a surety is bound, release the surety, although the statute is in the nature of a mere indulgence. See *State v. Roberts*, 68 Mo. 234; S.C. 30 Am. R. 788.



jointly with his principal; nor, in many States, will he be held bound to take notice of the default of his principal; but, on the other hand, may claim his discharge from liability to the extent that he has been damaged by want of notice of his principal's default. It is not so with a surety.<sup>1</sup>

From the foregoing distinctions between the respective liabilities and obligations of guarantors and sureties, a better understanding may be reached as to the true legal meaning of the terms guarantor and surety than can be gathered from a mere definition, however carefully the definition may be framed. And while it may not be expedient to attempt to treat the two classes of contracts separately, in the discussion of principles equally applicable to either, or to indulge in niceties of distinction where distinctions are of no practical value, it is important that the two classes of contracts should not be confounded, and that the rules of law applicable to one only, should not be applied indiscriminately to either.

## SECTION 2.—*Continuing and non-continuing guaranties.*

Contracts of guaranty may be entered into in respect to a single transaction or to a class of transactions; they may extend to past or future dealings, or both; they may be limited as to the time during which the guarantor's liability shall continue, as to the amount for which he shall in any event be liable, as to the amount or number of transactions to which the contract shall relate, or as to any or all of these particulars.

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<sup>1</sup> *McMillan v. Bull's Head Bank*, 32 Ind. 11; S. C. 2 Am. R. 323; *Central Savings Bank v. Shine*, 43 Mo. 456; S. C. 8 Am. R. 112; *Curtis v. Dennis*, 7 Metc. 510; *Kearnes v. Montgomery*, 4 West Va. 29. How far a guarantor is entitled to notice of his principal's default, and how far he will be discharged by want of notice, will be considered hereafter.

In construing these contracts the courts have experienced no little difficulty. They are often called upon to determine from brief contracts, drawn in haste by persons without knowledge of the technical force of the terms used, whether the guarantor intended by his undertaking to extend to another a loan of his credit in a class of transactions, without limit as to their number, or as to the time they might extend over, but limited as to the amount in which he should in any event be liable; or whether it was his intention to loan his credit in a certain transaction or transactions, limited in number, but without limit as to the amount of his liability, save so far as it might be measured by the damages legally resulting from the breach of the principal contract.

Guaranties are held to be continuing or non-continuing, according to the determination of this question of intention, as the same may be gathered from the terms of the undertaking, the recitals of the instrument, or by reference to the custom or course of dealing between the parties. If from the terms or recitals of the guaranty, or by reference to the custom or course of dealings between the parties, it appears that a future course of dealings for an indefinite time, or a succession of credits to be given, was contemplated by the parties, the contract is a continuing guaranty, and the amount expressed therein will limit the amount for which the guarantor is responsible, and not the amount to which the dealings or whole credit is to extend.<sup>1</sup> If, by the terms of the guaranty, it is evident

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<sup>1</sup> *Bent v. Hartshorn*, 1 Metc. 24; *Rindge v. Judson*, 24 N. Y. 64. 71. A guaranty signed by a firm, stating that: "We hold ourselves responsible for the payment of any sum, not to exceed \$5,000, W. may require of your bank for legitimate business purposes," has been held to be a continuing guaranty, unlimited as to time, and limited only as to the amount of the liability of the guarantors. *City National Bank v. Phelps*, 16 Hun, 158. On the other hand, it has been held that the words, "for any sum that my son George may become indebted to you, not exceeding \$200, I will hold myself accountable,"

that the object is to give a standing credit to the principal, to be used from time to time, either indefinitely or until a certain period, then the liability is continuing; but if no time is fixed, and nothing indicates a continuance of the undertaking, the presumption is in favor of a limited liability as to time, whether the amount is limited or not.<sup>1</sup>

These rules of construction have been given in this place for the reason that they define and distinguish continuing and non-continuing guaranties more clearly than mere words of definition and explanation, though fortified by references to reported cases. Precedents do not help much in the construction of such instruments. The

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did not imply a continuing guaranty. *White v. Reed*, 15 Conn. 457. A letter requesting the person addressed to let T. have "the paints, oils and varnishes, glass, &c., he wants, and I will be security for the amount for what he will owe you," has been held to be a continuing guaranty. *Boehne v. Murphy*, 46 Mo. 57; S. C. 2 Am. R. 485. On the other hand, a letter of credit stating that "T. wants some clothing and expects to give his business to you. Let him have the articles he wants, and I will see it paid," has been held to be a guaranty of one immediate sale only, and not a continuing guaranty. *Hilliard v. Hous*, 37 Texas, 717. The same construction was placed upon a guaranty in the following words: "Please send my son the lumber he asks for and it will be all right." *Birdsall v. Heacock*, 32 Ohio St. 177.

<sup>1</sup> *Fellows v. Prentis*, 3 Denio, 519; *Crist v. Burlingame*, 62 Barb. 351. The tendency of decision in this country has been against construing guaranties as continuing unless the intention of the parties is so clearly manifested as not to admit of a reasonable doubt. *Birdsall v. Heacock*, 32 Ohio St. 177; S. C. 30 Am. R. 572; *Lent v. Padleford*, 2 Am. Lead. Cas. 141; *Congdon v. Read*, 7 R. I. 576; *Gold v. Stevens*, 12 Mich. 292; *White v. Reed*, 15 Conn. 457; *Whitney v. Groot*, 24 Wend. 82; *Webb v. Dickerson*, 11 Wend. 62; *Aldrich v. Higgins*, 16 S. & R. 213; *Anderson v. Blakley*, 2 W. & S. 237. The general rules of construction of contracts of guaranty will be considered in a subsequent chapter. A study of the reported decisions, especially the earlier ones, will show that the courts are far from harmonious as to the rule of construction to be adopted. For example, Lord Ellenborough held that the words in a guaranty should be taken most strongly against the guarantor; and if he meant to be liable for a single dealing only, he should take care to say so (*Merle v. Wells*, 2 Camp. 413); while Judge Story held that, in doubtful cases, the presumption should be against the construction that the guaranty is continuing. *Cremer v. Higginson*, 1 Mason, 323.

dividing line between those which are limited and those which are continuous is not always plainly seen, and cases apparently quite similar are sometimes found upon one side of it, and sometimes upon the other. Where there is uncertainty upon the face of the instrument, its construction must necessarily depend upon the circumstances which throw light upon it, and hence the diversity.<sup>1</sup> It is, of course, a matter of the utmost importance that the party giving and the party receiving a guaranty should understand its import, and the liability created by it. The tendency of those doing business on the credit of others is to push that credit to the furthest limit, so long as third persons will act upon it; while, on the other hand, in case of loss, the person loaning the credit will, in most instances, insist on the most limited construction of his guaranty, and claim that it related to but a single transaction. Apt words of limitation inserted in the instrument itself will always furnish the best evidence of the intention of the parties.

SECTION 3.—*Absolute and conditional guaranties and offers of guaranty.*

There is a broad distinction between an absolute present guaranty, and a mere offer of guaranty at a future time. An agreement to guarantee the payment by another for goods to be sold in the future, not founded upon any present consideration passing to the guarantor, is a contract of a peculiar character. Until it is acted upon, it imposes no obligation and creates no liability on the part of the guarantor. After it is acted upon, the sale of the goods upon the credit of the guaranty is the only consideration for the conditional promise of the guarantor to pay for them. The agreement which the guarantor

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<sup>1</sup> *White's Bank v. Myles*, 73 N. Y. 335; S. C. 29 Am. R. 157.

makes with the person receiving the guaranty is not that I now become liable to you for anything, but that, if you sell goods to a third person, I will then become liable to pay for them if such third person does not. It is in the nature of an authority to sell goods upon the credit of the guarantor, rather than a contract which cannot be revoked except by mutual consent. Such guaranties are revocable at any time before they are acted upon.<sup>1</sup>

A statement in a letter of introduction that the bearer is desirous of making certain purchases; that the writer considers him good; and, if required, will indorse for him to a certain amount, is a conditional guaranty to be created if required, and then by indorsement only; and without a demand and refusal to indorse, gives no right of action against the guarantor.<sup>2</sup> A statement in writing that the writer "has no objection to guarantee," does not of itself constitute a guaranty, but only an overture of guaranty.<sup>3</sup>

But the use of the future tense, as "I will guarantee," does not necessarily imply a mere offer of guaranty, but when acted upon may well be a present undertaking.<sup>4</sup>

The distinction between an absolute present guaranty and a mere offer of guaranty is not one of mere form. Generally speaking, an absolute guaranty becomes operative as soon as made, without notice that it has been accepted and acted upon;<sup>5</sup> while a mere offer of guaranty

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<sup>1</sup> *Jordan v. Dobbins*, 122 Mass. 168; S. C. 23 Am. R. 305.

<sup>2</sup> *Stockbridge v. Schoonmaker*, 45 Barb. 100.

<sup>3</sup> *Symmons v. West*, 2 Starkie's R. 371; *Stafford v. Low*, 16 Johns. 67; *McIver v. Richardson*, 1 M. & S. 557.

<sup>4</sup> *McNaughton v. Conkling*, 9 Wis. 316; *Carman v. Elledge*, 40 Iowa, 409.

It is not every request that credit be extended to a third person that will amount to a guaranty. Thus, a written instrument requesting a merchant to "let M. have what goods he may want on four months, and he will pay as usual," is not a guaranty of any kind, but only an expression of confidence. *Eaton v. Mayo*, 118 Mass. 141.

<sup>5</sup> *Union Bank v. Coster's Executors*, 3 N. Y. 203; *Carman v. Elledge*, 40

becomes binding only upon notice of acceptance,<sup>1</sup> unless the person making the offer has in some way waived his right to notice.<sup>2</sup> So, an absolute present guaranty is irrevocable, except by consent of the person receiving the guaranty; while a conditional guaranty may be revoked at any time before it is acted upon.<sup>3</sup> So, if a guaranty is conditional, the person claiming the benefit of the guaranty must comply with its terms, before he can hold the guarantor liable.<sup>4</sup>

#### SECTION 4.—*Letters of credit.*

Contracts of guaranty are frequently made in the form of what are termed in law "letters of credit." In legal effect, a letter of credit is a request that credit be given to a person or persons therein named, coupled with an engagement that, if such credit be given, the writer will be answerable for any default on the part of the person to whom it is given, either generally or to a specified amount. Ordinarily, no request is expressed in terms in the letter of credit; but the promise of the writer to do an act in consideration of some act to be done by the promisor is in itself an implied request that the act be done upon which the writer bases his promise.

Letters of credit are of two kinds, general and special. A special letter of credit is addressed to a particular in-

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Iowa, 409; *Case v. Howard*, 41 Iowa, 479; *Maynard v. Morse*, 36 Vt. 617; *Paige v. Parker*, 8 Gray (Mass.), 211; *Bright v. McKnight*, 1 Sneed (Tenn.), 158; *Yancey v. Brown*, 3 Sneed (Tenn.), 89; *Beebe v. Dudley*, 6 Foster (N. H.), 249.

<sup>1</sup> *Davis Sewing Machine Co. v. Jones*, 61 Mo. 409; *McIver v. Richardson*, 1 M. & S. 557; *Stafford v. Low*, 16 Johns. 67; *Beekman v. Hale*, 17 Johns. 134; *Cahuzac v. Samini*, 29 La. 288; *Lawton v. Maner*, 9 Rich. Law (S. C.), 335; *Lowe v. Beckwith*, 14 B. Mon. (Ky.), 184.

<sup>2</sup> *Trefethen v. Locke*, 16 La. Ann. 19; *Farwell v. Sully*, 38 Iowa, 387.

<sup>3</sup> *Jordan v. Dobbins*, 122 Mass. 168; s. c. 23 Am. R. 305.

<sup>4</sup> *Hayden v. Crane*, 1 Lans. (N. Y.) 181.

dividual by name, is confined to him, and gives no other person a right to act upon it. A general letter of credit, on the other hand, is addressed to any and every person, and gives to any person to whom it may be shown authority to advance upon its credit. When such advances are made, a privity of contract springs up between the drawer of the letter and the person who has made the advances, and the transaction is the same in legal effect as if the letter had been addressed to him by name.<sup>1</sup>

Letters of credit may create either a continuing or a non-continuing guaranty, according to their terms.

The distinction between special and general letters of credit is important, as contracts of guaranty will not, except in special cases, be extended beyond their terms; and the guarantor will not be held liable to a person to whom he has made no promise, but who has acted upon the promise made to another.<sup>2</sup> The courts hold that a

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<sup>1</sup> *Union Bank v. Coster's Executors*, 3 N. Y. 203; *Russell v. Wiggins*, 2 Story, 214; *Adams v. Jones*, 12 Pet. 207; *Birckhead v. Brown*, 5 Hill, 641; *Griffin v. Rembert*, 2 S. C. 410; *Pollock v. Helm*, 54 Miss. 1; S. C. 28 Am. R. 342; *Watson v. McLaren*, 19 Wend. 557; S. C. 26 Wend. 425.

<sup>2</sup> *Barns v. Barrow*, 61 N. Y. 39; *Penoyer v. Watson*, 16 Johns. 100; *Lord Arlington v. Merricke*, 2 Saund. 414; *Wright v. Russell*, 2 W. Black, 934; *Myers v. Edge*, 7 Term R. 254; *Barker v. Parker*, 1 Term R. 287; *Simson v. Cooke*, 1 Bing. 425; *Strange v. Lee*, 3 East, 484; *Spies v. Houston*, 4 Bligh. N. S. 515; *Dry v. Davy*, 10 Ad. & Ell. 30.

The drawer of a letter of credit addressed to an individual will not be liable to a firm which has acted upon it, even though the person to whom the letter was addressed was a member of the firm. See *Barns v. Barrow*, 61 N. Y. 39. And a letter addressed to a firm which has ceased to exist will not authorize a former member of the firm to act upon it. *Penoyer v. Watson*, 16 Johns. 100. But a letter addressed to A. & B., but in fact intended for A. B. & Co., may be acted upon by the latter. *Wadsworth v. Allen*, 8 Gratt. 174. And if a contract of guaranty is entered into apparently with one partner, but in reality for the indemnity of the firm, the firm, on proof of the fact, may maintain an action on it. *Garrett v. Handley*, 3 B. & C. 463; S. C. 4 Id. 664; and see *Bateman v. Phillips*, 15 East, 272.

A guaranty addressed to a State bank is not terminated by the change of the domestic corporation into a national bank, and by the consequent change of the name of the corporation. *City National Bank v. Phelps*, 16 Hun, 158.

letter of credit addressed to a particular person is limited to him ; that the writer must be deemed to have granted it in reliance on his prudence and discretion in acting upon it ; that such letter contains no general power to interpose the writer's credit or to transmit his guaranty ; and that this must specially be observed where the general terms of the letter make the personal limitation the only restraint on the responsibility of the writer.<sup>1</sup>

Letters of credit are special contracts, and are not negotiable in a legal sense, nor are they to be construed as actual acceptances of bills or orders drawn under them, but rather as agreements to accept such as may be drawn in good faith and within the limits of the credit or deposit specified.<sup>2</sup> If the letter states that the bearer is authorized to draw on the writer for a limited sum, a party making advances on the faith of the letter must ascertain at his peril whether the authority has been exhausted,<sup>3</sup> or if it authorizes advances to be made or goods sold on the credit of the writer, the person acting on the faith of the letter must exercise diligence so far as to ascertain whether the person upon whose credit he is dealing is still living, or whether the authority contained in the letter has been revoked by death.<sup>4</sup>

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<sup>1</sup> *Barns v. Barrow*, 61 N. Y. 39; *Union Bank v. Coster's Executors*, 3 N. Y. 203; *Taylor v. Wetmore*, 10 Ohio, 490; *Birckhead v. Brown*, 5 Hill, 634; S. C. 2 Denio, 375; *Walsh v. Bailie*, 10 Johns. 180; *Robbins v. Bingham*, 4 Johns. 476; *Penoyer v. Watson*, 16 Johns. 100. This is the doctrine of the old case of *Philip v. Melville*, cited in *Burge on Suretyship*, p. 68; and agrees with the maxim of the Roman law, that "an agreement to guarantee made with one person cannot be extended to another person."

<sup>2</sup> *Roman v. Serna*, 40 Texas, 306; see *Pollock v. Helm*, 54 Miss. 1; S. C. 28 Am. R. 342, 344.

<sup>3</sup> *Ranger v. Sargent*, 36 Texas, 26; but see *Russell v. Wiggin*, 2 Story, 213.

<sup>4</sup> *Jordan v. Dobbins*, 122 Mass. 168.



SECTION 5.—*Requests and expressions of confidence.*

It sometimes occurs that parties unacquainted with the nature of contracts of guaranty act upon mere requests that they will sell goods to or otherwise aid a third person, supposing that the written request renders the writer liable as a guarantor.

A mere request by one person that credit be given to another does not create a legal liability;<sup>1</sup> and a mere expression of confidence in the ability or integrity of another will not amount to a guaranty.<sup>2</sup> Thus a letter stating that the bearer was a person in whom confidence could be placed, and that, if he were given time, the purchase-money would be forthcoming, does not amount to an undertaking upon which the writer can be held liable.<sup>3</sup> Nor does a letter requesting that credit be given another and containing a statement that "he will pay as usual," amount to a guaranty.<sup>4</sup> But a letter to a merchant with whom the writer has been dealing, introducing the writer's brother and requesting the merchant to introduce him to some of the houses at which he dealt, "with assurances that any contract of his will and shall be promptly paid," is a guaranty of payment.<sup>5</sup>

On the other hand, a letter stating that "my friend D. goes to your city for goods on short credit; and I am satisfied that you will be safe in selling him any amount he may see fit to purchase; from my long acquaintance with him I do not hesitate to say that he is as punctual a man as I know," does not contain the essential element of a guaranty, but is a mere expression of opinion, and

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<sup>1</sup> *Bushnell v. Bishop Hill Colony*, 28 Ill. 204.

<sup>2</sup> *Case v. Luse*, 28 Iowa, 527.

<sup>3</sup> *Id.*

<sup>4</sup> *Eaton v. Mayo*, 118 Mass. 141.

<sup>5</sup> *Moore v. Holt*, 10 Gratt. (Va.) 284.

if written in good faith does not subject the writer to liability.<sup>1</sup>

SECTION 6.—*How far negotiable or assignable.*

It is well settled in New York, that the transfer of a debt or obligation carries with it as an incident all securities for its payment; and that any person who can enforce the principal contract can enforce a guaranty of it.<sup>2</sup> Thus it is held that the assignment of a bond and mortgage gives to the assignee the benefit of a guaranty of collection by a previous assignor, and the right to sue upon it, although the guaranty is not in terms transferred with the principal obligation.<sup>3</sup>

Under the statutes of Iowa, a contract of guaranty is assignable, and the assignee may maintain an action thereon in his own name.<sup>4</sup> So under the statutes of Michigan a guaranty of collection indorsed on a promissory note payable to bearer may be sued by any subsequent holder in his own name, subject, however, to any equities between the guarantor and the person with whom the contract is made.<sup>5</sup>

But it has been held in a number of cases that a guaranty is a special contract, not negotiable; that no suit can be maintained thereon except by the party with whom it is made;<sup>6</sup> that the words "I guarantee the payment of semi-annual interest on this note, as well as the principal," do not constitute a negotiable guaranty *per se*,

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<sup>1</sup> Hardy v. Pool, 6 Ired. Eq. 28.

<sup>2</sup> Craig v. Parkis, 40 N. Y. 181; Claflin v. Ostrom, 54 N. Y. 581; and see Cady v. Sheldon, 38 Barb. 103.

<sup>3</sup> Craig v. Parkis, 40 N. Y. 181.

<sup>4</sup> First National Bank v. Carpenter, 41 Iowa, 518.

<sup>5</sup> Waldron v. Harring, 28 Mich. 493; Mich. Comp. Laws, § 1564.

<sup>6</sup> Springer v. Hutchinson, 1 App. 359; M'Doul v. Yeomans, 8 Watts, 361; Ten Eyck v. Brown, 4 Chand. (Wis.) 151; Smith v. Dickinson, 6 Humph. 261.

nor do they become negotiable by being written upon a negotiable instrument ;<sup>1</sup> and that a general guaranty warranting the collection of a note does not authorize a suit against the guarantor by any subsequent holder.<sup>2</sup> On the other hand, it has been held that a general guaranty in the words, "I hereby guarantee the payment of a note made by," &c., not naming any person as the party guaranteed, may be declared on by any person who advances money upon it, but that it is not negotiable unless made upon the note the payment of which it guarantees.<sup>3</sup>

In Pennsylvania, it was held that where N. guaranteed the payment of a mortgage debt, and the mortgage was afterwards assigned to the administrators of N., and by them assigned to S., "with all the rights, remedies, incidents, &c., thereunto belonging," the guaranty was extinguished.<sup>4</sup> But this does not determine the effect of an assignment to a person other than the personal representative of the guarantor.

The law relating to the transfers of guaranties of negotiable instruments, as declared by the Supreme Court of the State of New York, seems to be founded upon reason and principle. It is there held, that if a guaranty is written upon a note, and the note is transferred without anything being said touching the guaranty, the contract of guaranty passes with the note ; in other words, the sale and delivery of the note with the guaranty upon it furnishes *prima facie* proof of a sale of the contract of guaranty ; and the possession of the note and the guaranty is *prima facie* evidence of a right in the holder to the guaranty, and will authorize him to maintain an

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<sup>1</sup> True v. Fuller, 21 Pick. 140.

<sup>2</sup> Lamourieux v. Hewitt, 5 Wend. 307.

<sup>3</sup> Watson v. McLaren, 19 Wend. 557 ; S. C. 26 Wend. 425.

<sup>4</sup> Fluck v. Hager, 51 Penn. St. 459.

action thereon, unless it be shown that the contract of guaranty was not in fact transferred with the note.<sup>1</sup>

But as the guaranty is a special contract, and not strictly negotiable under the law merchant, the bearer or indorsee of a note with such a guaranty indorsed upon it, takes the contract of guaranty as assignee of a special contract, and in his hands it is subject to every defense which might have been made against it in the hands of the person to whom it was originally given. The guarantor cannot set up as a defense to an action of law thereon, that it was not intended that he should be bound by it, nor that his duty and obligation is different from that expressed in the instrument; but he can show that he did not make it; that it has not been delivered; that it came to the hands of the party who claimed to have received it from the guarantor by accident or mistake; that it was surreptitiously obtained; or in fact anything else which would establish that no such contract of guaranty had ever been made.<sup>2</sup>

Letters of credit are not negotiable.<sup>3</sup>

Guaranties may be so drawn as to render them negotiable. Thus, where a note payable to A. or bearer, has indorsed thereon a guaranty of payment to A. or bearer, an action will lie on the guaranty in favor of any subsequent holder.<sup>4</sup>

As will be more fully shown in a subsequent chapter, an indorsement in blank, before delivery, on the back of a promissory note by a person not otherwise a party to the instrument, is held in many States to constitute a contract of guaranty, and the indorser is charged with all the liabilities of a guarantor. There seems to be no

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<sup>1</sup> *Cooper v. Dedrick*, 22 Barb. 516.

<sup>2</sup> *Gallagher v. White*, 31 Barb. 92.

<sup>3</sup> *Roman v. Serna*, 40 Texas, 306; *Robbins v. Bingham*, 4 Johns. 476.

<sup>4</sup> *Ketchell v. Burns*, 24 Wend 456.

question raised as to the negotiability of the contract so created, or as to the liability of the indorser to the holder of the note. And there is also a large class of contracts growing out of the necessity of taking security from persons holding public office, assuming trusts, or becoming liable for others in legal proceedings, in which it is impossible to foresee what person or persons would be injured by the default of the officer or trustee, and therefore the obligation is drawn in favor of the people or some public officer. In respect to such obligations it is often provided by statute, that on default of the principal the obligation may be assigned to the person or persons sustaining loss by reason of the default in order that an action may be brought thereon.

#### SECTION 7.—*Guaranties of payment and of collection.*

There is a broad distinction made by the courts between guaranties of payment and guaranties of collection of notes or other obligations.

A guaranty of payment of a note is an absolute, unconditional undertaking on the part of the guarantor that the maker will pay the note when due,<sup>1</sup> or that the guarantor will pay the debt at maturity if the maker does not;<sup>2</sup> and the contract of the guarantor is broken upon the failure of the maker to meet his obligation.

In some respects the contract of the guarantor of a promissory note resembles that of a surety, but differs in others. The guarantor and surety are bound for the same thing—the payment of the note, but the guarantor is not like the surety bound with the maker. His liability does not commence until his principal makes default, while the surety is a debtor from the beginning. The

<sup>1</sup> *Brown v. Curtiss*, 2 N. Y. 225; *Allen v. Rightmere*, 20 Johns. 365.

<sup>2</sup> *Day v. Elmore*, 4 Wis. 190; see *Evans v. Bell*, 45 Texas, 553.

guarantor's contract is collateral to that of his principal, while that of the surety is not.

A guaranty of collection is an entirely different contract. It is sometimes defined as an undertaking to pay a debt on condition that the person to whom the guaranty is given shall diligently prosecute the principal debtor without avail,<sup>1</sup> or that the debt will be paid if the principal be prosecuted with reasonable diligence,<sup>2</sup> or that the debt is collectible by due course of law.<sup>3</sup>

In New York, it is said that the fundamental distinction between a guaranty of payment and one of collection is, that in the first case the guarantor undertakes unconditionally that the debtor will pay, and the creditor may, upon default, proceed directly against the guarantor, without taking any steps to collect of the principal debtor, and the omission or neglect to proceed against him is not (except under special circumstances) any defense to the guarantor; while, in the second case, the undertaking is, that if the demand cannot be collected by legal proceedings, the guarantor will pay, and consequently legal proceedings against the principal debtor, and a failure to collect of him by these means are conditions precedent to the liability of the guarantor; and to these the law, as established by numerous decisions, attaches the further condition that due diligence be exercised by the creditor in enforcing his legal remedies against the debtor.<sup>4</sup>

The New York doctrine requiring the creditor in all

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<sup>1</sup> *Day v. Elmore*, 4 Wis. 190.

<sup>2</sup> *Craig v. Parkis*, 40 N. Y. 181; see *Evans v. Bell*, 45 Texas, 553.

<sup>3</sup> *Cumpston v. McNair*, 1 Wend. 457.

<sup>4</sup> *McMurray v. Noyes*, 72 N. Y. 523. See, also, *Craig v. Parkis*, 40 N. Y. 181; *Northern Ins. Co. v. Wright*, 76 N. Y. 445; *Moakley v. Riggs*, 19 Johns. 69; *Thomas v. Woods*, 4 Cow. 173; *Burt v. Horner*, 5 Barb. 501; *Loveland v. Shepard*, 2 Hill, 139; *Allison v. Waldham*, 34 Ill. 132; *Shepard v. Shears*, 35 Texas, 763.

cases to proceed to judgment and execution against the principal debtor before resorting to the guarantor upon his guaranty of collection, has not been universally approved or adopted; and in many, if not in most of the States, a creditor is not required to sue an insolvent maker of a note before proceeding against the guarantor. So the doctrine that the person to whom a guaranty of payment has been given, may, upon the default of the principal debtor, proceed at once against the guarantor without previous notice of non-payment,<sup>2</sup> and without any attempt to collect from the principal debtor,<sup>3</sup> has been recognized in some of the States, but has been as expressly disapproved in others,<sup>4</sup> except in peculiar cases where the circumstances were such as to dispense with such notice.<sup>5</sup>

The difference between a guaranty of payment and a guaranty of collection is deemed so material that the alteration of a guaranty of collection to one of payment has been held to discharge the guarantor.<sup>6</sup>

Contracts of guaranty may be so drawn as to include both payment and collection. Upon such guaranties the holder has his election either to proceed in the first instance against the principal debtor, or against the guarantor.

If he elects to proceed against the principal debtor,

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<sup>1</sup> *Benton v. Fletcher*, 31 Vt. 418; *Bull v. Bliss*, 30 Vt. 127; *Dana v. Conant*, 30 Vt. 246; *Brackett v. Rich*, 23 Minn. 485; *Stone v. Rockefeller*, 29 Ohio St. 625; see *Perkins v. Catlin*, 11 Conn. 213; *Ransom v. Sherwood*, 26 Conn. 437; *Gillighan v. Boardman*, 29 Me. 79; *M'Doul v. Yeomans*, 8 Watts, 361; *McClurg v. Fryer*, 15 Penn. St. 293; *Marsh v. Day*, 18 Pick. 321; *Sanford v. Allen*, 1 Cush. 473; *Camden v. Doremus*, 3 How. (U. S.) 515.

<sup>2</sup> *Clay v. Edgerton*, 19 Ohio St. 549; s. c. 2 Am. R. 422; *Barker v. Scudder*, 56 Mo. 272.

<sup>3</sup> *Day v. Elmore*, 4 Wis. 190; *Roberts v. Riddle*, 79 Penn. St. 468.

<sup>4</sup> *Gaff v. Sims*, 45 Ind. 262; *Gieger v. Clark*, 13 Cal. 579.

<sup>5</sup> *Viriden v. Ellsworth*, 15 Ind. 144.

<sup>6</sup> *Newlan v. Harrington*, 24 Ill. 206.

and fails to collect, he has his remedy against the guarantor, both for the debt and the costs of the action against the principal.<sup>1</sup>

Contracts may also be so drawn as to fall within the general classification of guaranties of collection, and yet not be subject to all the rules governing that class of contracts. Thus, a person in assigning a bond and mortgage may covenant that, in case of foreclosure and sale of the mortgaged premises, if the proceeds of the sale are insufficient to satisfy the mortgage debt with the costs of foreclosure, he will pay the amount of the deficiency. Such an instrument is not in the nature of an unconditional undertaking that the mortgagor will pay, nor that the guarantor will pay on default of the mortgagor, but only that the guarantor will pay in case of a deficiency arising on a foreclosure and sale. The only difference between this and an ordinary guaranty of collection is, that in the latter case the undertaking is that, after it has been ascertained by all such legal proceedings as the case admits of that the demand cannot be collected, the guarantor will pay; while in case of the contract mentioned, the only proceedings which the creditor is bound to adopt, are a foreclosure of the mortgage and sale of the mortgaged lands.<sup>2</sup>

#### SECTION 8.—*Distinction between a guaranty and an indorsement.*

There are a few cases in the books holding that a guarantor of payment occupies in some respects the position of an indorser, and is entitled to the same notice in case of non-payment; and for this reason it may not

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<sup>1</sup> *Tuton v. Thayer*, 47 How. 180.

<sup>2</sup> *McMurray v. Noyes*, 72 N. Y. 523.



be amiss to compare the nature of the two classes of contracts, and see wherein they differ.

Justice Strong says: "The direct engagement of the indorser of a negotiable note, and of the guarantor of the payment of a note, whether negotiable or not, is the same. Both undertake that the maker shall pay the amount when it shall become due. If there is a failure in the payment, both contracts are broken. Ordinarily, upon the breach of a contract, the party bound for its performance immediately becomes liable for the consequent damages. In case of the indorser of a negotiable promissory note, however, the liability does not become absolute, unless due notice of non-payment is given to the party whom it is intended to charge. That is not because the indorser has thus stipulated in terms, but it is a condition annexed by the rules of the commercial law. In the case of a guarantor there is nothing to exempt him from the ordinary liability of parties who have broken their contracts which is direct and not conditional. No condition requiring notice of non-payment is inserted in the contract, nor is any inferred by any rule of law."<sup>1</sup>

#### SECTION 9.—*Implied warranty of principal obligation.*

In addition to the promise contained in a contract of guaranty, there is an implied contract on the part of the guarantor that the principal contract is a valid and binding instrument.<sup>2</sup> Thus the guaranty of the payment of a bond imports an agreement or undertaking that the makers of the bond were competent to contract in the

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<sup>1</sup> *Brown v. Curtiss*, 2 N. Y. 230.

<sup>2</sup> *Remsen v. Graves*, 41 N. Y. 471; *McLaughlin v. McGovern*, 34 Barb. 208, *Penfield v. Goodrich*, 10 Hun, 41; *Putnam v. Schuyler*, 4 Hun, 166.

manner they have contracted, and that the instrument is a binding obligation upon them.<sup>1</sup>

The same rule is applied to indorsements, and every indorser of a promissory note or bill of exchange is in law a guarantor of the genuineness of every preceding indorsement, and of the genuineness of the instrument.<sup>2</sup>

# SECTION 10.—*Guaranties against loss and contracts for indemnity.*

There is another class of guaranties differing in form from those heretofore considered, which partake somewhat of the nature of guaranties of collection, and yet differ in respect to the amount of damages recoverable in case of a recovery against the guarantor. In this class are guaranties against loss. Thus, on the assignment of a mortgage, if the guarantor executes an instrument guaranteeing the purchaser against loss, the undertaking will be deemed a guaranty of collection, and will be governed by the rules applicable to that class of guaranties. But the liability of the guarantor under his guaranty will be limited to the amount paid and received as the consideration for its execution, without regard to the consideration expressed in the deed of assignment.<sup>3</sup>

There are also contracts closely resembling, in legal effect, guaranties against loss, but which vary widely from such contracts in form. These are the ordinary contracts to indemnify either against liability or loss, and are gen

<sup>1</sup> *Remsen v. Graves*, 41 N. Y. 471; *Mann v. Eckford's Executors*, 15 Wend. 502; *Zabriskie v. Cleveland, Columbia & Cincinnati R. R. Co.* 23 How. (U. S.) 399.

<sup>2</sup> *White v. Continental National Bank*, 64 N. Y. 316; *Turnbull v. Bowyer*, 40 N. Y. 456; *Erwin v. Downs*, 15 N. Y. 575; *Dalrymple v. Hillenbrand*, 62 N. Y. 5; *Coggill v. American Exchange Bank*, 1 N. Y. 113; *Condon v. Pearce*, 43 Md. 83; *Chambers v. Union National Bank*, 78 Penn. St. 205.

<sup>3</sup> *Griffith v. Robertson*, 15 Hun, 344; *Goldsmith v. Brown*, 35 Barb. 484; *Jones v. Stuckbury*, 1 Barb. Ch. 250.

erally drawn in the form of a bond. There is a broad distinction between a bond to indemnify against liability and a bond to indemnify against loss or damage by reason of liability. In the former case, the covenantee is to be saved from the thing specified, and in the latter from the consequences of it. In the former case the contract is broken when the liability is incurred; while in the latter there is no breach until actual damage is sustained.<sup>1</sup> There is also a contract of indemnity implied by law in all cases where one party, at the request of another, enters into a contract as his surety. These contracts, so far as they fall within the scope of this work, will be fully treated in subsequent chapters.

SECTION II.—*Distinction between a guaranty of payment and a new note.*

In a number of cases it has been held that a guaranty of payment indorsed upon a promissory note is in effect a new promissory note. But there is one element essential to a promissory note that is wanting in a guaranty of payment. To constitute a promissory note, there must be a written promise to pay, absolutely and unconditionally, a certain sum of money therein named, by one person to another therein named, or to his order, or to the order of any other person, or to the bearer, at a time specified, or on demand, or immediately. In a guaranty of payment, the promise of the guarantor is not that *he* will pay a certain sum of money at a specified time absolutely and unconditionally, but merely that the *maker* of the note will pay it according to its terms. Until the maker makes default, the guarantor is under no obligation to pay, his undertaking to pay being only in the

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<sup>1</sup> Gilbert v. Wiman, 1 N. Y. 550; Belloni v. Freeborn, 63 N. Y. 383; Kohler v. Matlage, 72 N. Y. 259.

event that the maker shall make default. The guaranty does not, therefore, contain a positive engagement that the guarantor will pay the money, and without this engagement no written promise, whatever else it may be, can be a promissory note.<sup>1</sup>

SECTION 12.—*Statutory bonds and undertakings.*

A common form of contracts of suretyship is met with in the statutory bonds and undertakings given during the pendency of legal proceedings. These contracts are somewhat peculiar in their nature. They may be given by one party to an action upon taking some further proceeding therein, not only without the consent, but even against the wishes of the party for whose security they are executed. The element of mutuality is wholly absent from these contracts, and the delivery, acceptance, or assent required in other contracts are in these ignored. No consideration is necessary to uphold a statutory bond or undertaking, nor need any be expressed in the instrument, or proved on the trial of an action to enforce a liability created thereby. To this class of contracts the statute of frauds does not apply.<sup>2</sup> Further than this, the statute may, and in many instances does, dispense with the execution of the instrument by the principal. Thus, under the New York Code of Civil Procedure, a party need not join with his sureties in the execution of a bond or undertaking required by that act to be given by him or in his behalf, unless the provision of the act requiring the instrument also requires him to execute the same.<sup>3</sup>

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<sup>1</sup> Durham v. Manrow, 2 N. Y. 533.

<sup>2</sup> Thompson v. Blanchard, 3 N. Y. 335; Bildersee v. Aden, 62 Barb. 175; Doolittle v. Dininny, 31 N. Y. 350. But see Post v. Doremus, 60 N. Y. 371.

<sup>3</sup> Code of Civil Pro. § 811.

A bond so executed, would not, at common law, be binding upon the sureties who executed it.<sup>1</sup>

In many instances the statute requiring a bond or undertaking in an action provides also for its enforcement, and permits a party not named therein to maintain an action in his own name to recover the penalty given for its breach.<sup>2</sup>

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<sup>1</sup> Russell v. Annable, 109 Mass. 72; S. C. 12 Am. R. 665.

<sup>2</sup> See New York Code of Civil Pro. § 814.

## CHAPTER II.

### CREATION OF THE RELATION OF PRINCIPAL AND SURETY OR GUARANTOR.

Section 1.—By direct contract.

2.—By blank indorsement of notes.

3.—By signatures to notes.

4.—By the assumption of a mortgage debt.

5.—By the assumption of partnership liabilities.

6.—By contracting a joint liability.

#### SECTION 1.—*By direct contract.*

No particular form of words is required to constitute a contract of guaranty. Any language which, on a fair interpretation, imports a promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of another person who is in the first instance liable to such payment or performance, will constitute a contract of guaranty.

Ordinarily the word “guaranty” is incorporated in the agreement; and when the actual nature of the contract is thus expressed, the relation of the parties is clear. It is only where the contract is obscure in its terms, or rests in implication, that a doubt as to the nature of the contract arises.

One of the most common forms of guaranty is the ordinary letter of credit, wherein the writer directly or impliedly requests a person to deal with the bearer on the writer's credit, and undertakes to answer to the person acting thereon for the default of the bearer. Another form of the contract is the guaranty of payment or collection of notes or other obligations, indorsed in terms on the paper guaranteed. In all these cases, the nature

and intention of the parties appears by the terms of the contract itself.

So, the contract of suretyship may be created by any form of expression which will clearly indicate the intention of the parties, the rules of construction of these contracts being the same as apply to all others. The essentials to the validity of these contracts, and particularly the requirements of the statute of frauds, will be considered hereafter.

### SECTION 2.—*By blank indorsement of notes.*

The relation of guarantor and surety can also be created by contracts which in themselves express no intention on the part of the guarantor or surety to assume that relation. This is illustrated by the indorsement in blank of negotiable or non-negotiable paper by a stranger thereto.

In some States at least, where a party writes his name upon the back of a note not negotiable, there being no contract of indorsement, the courts endeavor to give effect to the contract in some other way, and allow the holder to overwrite the indorser's name with the real contract, either that of a maker or guarantor, as the case may be.<sup>1</sup>

In thus giving effect to this nondescript contract, the courts act upon the theory, that, as the contract of indorsement has no existence except in relation to negotiable paper, no contract of indorsement, in its legal sense, can be presumed from the position of the name

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<sup>1</sup> Richards v. Warring, 1 Keyes, 576; S. C. 4 Abb. App. Dec. 47; Dean v. Hall, 17 Wend. 214; Seymour v. Van Slyke, 8 Wend. 403, 421; Cromwell v. Hewitt, 40 N. Y. 491; Josselyn v. Ames, 3 Mass. 274; Hunt v. Adams, 5 Mass. 358; Herrick v. Carman, 12 Johns. 159; Seabury v. Hungerford, 2 Hill, 80; Hall v. Newcomb, 3 Hill, 233; Griswold v. Slocum, 10 Barb. 402; Hopkins v. Richardson, 9 Gratt. 494; Ford v. Mitchell, 15 Wis. 308.

on the back of the note; but as the party placing his name there must have intended to bind himself in some capacity, the maxim *ut res magis valeat quam pereat* applies, and the courts construe his contract either as that of a co-maker or guarantor.

In some States, the assignor of a non-negotiable promissory note by blank indorsement is liable on his indorsement only as a guarantor; and, in others, as a joint maker simply.<sup>1</sup>

In New York, a broad distinction is made between the indorsement in blank of negotiable and non-negotiable notes; and it is there held, that a person indorsing in blank a negotiable promissory note, before delivery to the payee, is presumed to intend to become liable as a second indorser only; and that, in the absence of proof of a contrary intent, he is not liable upon the note to the payee, who is supposed to be the first indorser.<sup>2</sup> This distinction between the legal effect of blank indorsements of negotiable and non-negotiable promissory notes was not adopted in New York without strong dissent,<sup>3</sup> and has been generally disregarded in the other States,<sup>4</sup> or expressly repudiated.<sup>5</sup> And cannot be maintained on any principle where it is held, as it is in New Jersey, that

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<sup>1</sup> *Sutton v. Owen*, 65 N. C. 123; *Houghton v. Ely*, 26 Wis. 181; S. C. 7 Am. Rep. 52; *Gorman v. Ketcham*, 33 Wis. 427.

<sup>2</sup> *Coulter v. Richmond*, 59 N. Y. 478; *Phelps v. Vischer*, 50 N. Y. 69; *Bacon v. Burnham*, 37 N. Y. 614; *Spies v. Gilmore*, 1 N. Y. 321; and, to the same effect, see *Elbert v. Finkbeiner*, 68 Penn. St. 243; S. C. 8 Am. Rep. 176; *Schafer v. Farmers' and Mechanics' Bank*, 59 Penn. St. 144.

<sup>3</sup> See dissenting opinions in *Hall v. Newcomb*, 3 Hill, 233; *Waterbury v. Lincoln*, 16 How. 329; *Ellis v. Brown*, 6 Barb. 295.

<sup>4</sup> *Rothschild v. Grix*, 31 Mich. 150; S. C. 18 Am. Rep. 171; *Cromwell v. Hewitt*, 40 N. Y. 492, note.

<sup>5</sup> *Perkins v. Catlin*, 11 Conn. 213; *Chaffee v. Jones*, 19 Pick. 260; *Lewis v. Harvey*, 18 Mo. 74; *Sumner v. Gay*, 4 Pick. 311; *Champion v. Griffith*, 13 Ohio, 228; *Herbage v. McEntee*, 40 Mich. 337.



the first indorsement by a person not a party to a note creates no implied commercial contract whatever.<sup>1</sup>

There is a considerable diversity of opinion among the courts of the different States as to the nature of the contract implied by a blank indorsement of a negotiable promissory note by one not a party to it, and before delivery to the payee. In England, and in some of the States, such an indorser is *prima facie* regarded as a guarantor,<sup>2</sup> in others as an indorser,<sup>3</sup> and in others as a maker or joint promisor.<sup>4</sup>

The conflict between these decisions is irreconcilable; but in nearly all of them the principle is recognized, that whatever may be the construction put upon a blank in-

<sup>1</sup> Chaddock v. Vanness, 35 N. J. 517; S. C. 10 Am. Rep. 256.

<sup>2</sup> Camden v. M'Koy, 3 Scam. (Ill.) 434; Cushman v. Dement, Id. 497; Parkhurst v. Vail, 73 Ill. 343; Boynton v. Pierce, 79 Ill. 145; Carroll v. Weld, 13 Ill. 682; Klein v. Currier, 14 Ill. 237; Fegenbush v. Lang, 28 Penn. St. 193; Watson v. Hunt, 6 Gratt. 633; Beckwith v. Angel, 6 Conn. 315; Fuller v. Scott, 8 Kansas, 25; Chandler v. Westfall, 30 Tex. 475; Killian v. Ashley, 24 Ark. 511; Van Doren v. Tjader, 1 Nev. 380; Firman v. Blood, 2 Kansas, 496; Veach v. Thompson, 15 Iowa, 380; Champion v. Griffith, 13 Ohio, 228; Webster v. Cobb, 17 Ill. 459; Blatchford v. Milliken, 35 Ill. 434; Ransom v. Sherwood, 26 Conn. 437; Riddle v. Stevens, 32 Conn. 378; Rhodes v. Seymour, 36 Conn. 1; Seymour v. Leyman, 10 Ohio St. 283; Greenough v. Smead, 3 Ohio St. 415; see, also, Sturtevant v. Randall, 53 Me. 154; Lowell v. Gaye, 38 Me. 36; McGee v. Connor, 1 Utah T. 92.

<sup>3</sup> Houston v. Bruner, 39 Ind. 375; Heath v. Van Cott, 9 Wis. 516; Coulter v. Richmond, 59 N. Y. 487; Hall v. Newcomb, 7 Hill, 416; Vore v. Hurst, 13 Ind. 551; Wells v. Jackson, 6 Blackf. 40; Jennings v. Thomas, 13 Sm. & M. 617; Frear v. Dunlap, 1 Greene (Iowa), 331; Jones v. Goodwin, 39 Cal. 493; S. C. 2 Am. Rep. 473; Roberts v. Masters, 40 Ind. 460; Eilbert v. Finkbeiner, 68 Penn. St. 243; S. C. 8 Am. Rep. 176; Clouston v. Barbieri, 4 Sneed, 336; Pierce v. Kennedy, 5 Cal. 138.

<sup>4</sup> Cahn v. Dutton, 60 Mo. 297; Butler v. Gambs, 1 Mo. App. 466; Good v. Martin, 2 Col. T. 218; Childs v. Wyman, 44 Me. 433; Gilpin v. Marley, 4 Hous. (Del.) 284; Sylvester v. Downer, 20 Vt. 355; Robinson v. Bartlett, 11 Minn. 410; Strong v. Riker, 16 Vt. 554; Essex Co. v. Edmonds, 12 Gray, 274; Peckham v. Gillman, 7 Minn. 446; Baker v. Block, 30 Wis. 225; Sullivan v. Violett, 6 Gill. 181; Schneider v. Schiffman, 20 Miss. 571; Rothschild v. Grix, 31 Mich. 150; S. C. 18 Am. Rep. 171; Walz v. Alback, 37 Md. 404; Seymour v. Farrell, 51 Mo. 95; Mammon v. Hartman, 51 Mo. 168.

dorsement, in the absence of proof of the actual intention of the parties, yet, when that intent appears, the interpretation of the contract will be such as to carry that intention into effect ;<sup>1</sup> and, in most cases, it is admitted that parol proof of the facts and circumstances which took place at the time of the transaction are admissible to aid in determining that intent

In the Supreme Court of the United States it is held, that when a promissory note, made payable to a particular person, or order, is first indorsed by a third person, such third person is an original promisor, guarantor or indorser, according to the nature of the transaction, and the understanding of the parties at the time the transaction took place. If such third person put his name in blank on the back of the note at the time it was made, and before it was indorsed by the payee, or if he participated in the consideration of the note, he is a joint maker ; but if his indorsement was subsequent to the making of the note, and to the delivery of the same to take effect, and he put his name there at the request of the maker, pursuant to a contract of the maker with the payee for further indulgence or forbearance, he can only be held as a guarantor ; but if the note was intended for discount, and he put his name on the back of it, with the understanding of all the parties that his indorsement would be inoperative until the instrument was indorsed by the payee, he would then be liable only as a second indorser in the commercial sense.<sup>2</sup>

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<sup>1</sup> *Ives v. Bosley*, 35 Md. 262 ; S. C. 6 Am. Rep. 411 ; *Rey v. Simpson*, 22 How. (U. S.) 341 ; *Good v. Martin*, 95 U. S. 90.

<sup>2</sup> *Rey v. Simpson*, 22 How. (U. S.) 341 ; *Good v. Martin*, 95 U. S. 90, citing *Schneider v. Schiffman*, 20 Mo. 571 ; *Irish v. Cutler*, 31 Me. 537 ; see, also, *Chaddock v. Vanness*, 35 N. J. 517 ; S. C. 10 Am. Rep. 256, 263 ; *Tenney v. Prince*, 4 Pick. 385 ; *Beckwith v. Angel*, 6 Conn. 315 ; *Camden v. McKoy*, 3 Scam. 437 ; *Greenough v. Smead*, 3 Ohio St. 715 ; *Rivers v. Thomas*, Tenn. Sup. Ct. Dec. 1878.

In Connecticut, it is held that the legal import of a blank indorsement of a negotiable note by a stranger thereto, in the absence of proof of a different intention, is an engagement that the note is due and payable according to its tenor; that the maker shall be of ability to pay it when due; and that by the use of due diligence it will be then collectible.<sup>1</sup>

In Massachusetts, a person, not a party, placing his name on the back of a promissory note at the time it is made, is held to be liable as a maker;<sup>2</sup> and this is the general rule throughout the New England States.<sup>3</sup> And, in some of the cases, it is held that evidence that the party put his name on the back of a note, with authority to fill up the blank indorsement with a guaranty, is inadmissible as against the holder who took the paper without notice.<sup>4</sup> When, however, it appears that the indorsement was subsequent to the delivery of the note to the payee, the indorser is sometimes treated as a guarantor.<sup>5</sup>

In Vermont, it is held that if one not a party indorse a promissory note, he is *prima facie* liable as a maker; but that the real intention of the signer may be shown.<sup>6</sup>

In Kansas, such an indorsement creates a contract of guaranty, unless the parties had a different understanding at the time.<sup>7</sup>

<sup>1</sup> *Holbrook v. Camp*, 38 Conn. 23; *Perkins v. Catlin*, 11 Conn. 212; *Rhodes v. Seymour*, 36 Conn. 1; *Ransom v. Sherwood*, 26 Conn. 437.

<sup>2</sup> *Union Bank of Weymouth v. Willis*, 8 Metc. 504; *Hawkes v. Phillips*, 7 Gray, 284; *Draper v. Weld*, 13 Gray, 580.

<sup>3</sup> See note to *Cromwell v. Hewitt*, 40 N. Y. 494.

<sup>4</sup> *Draper v. Weld*, 13 Gray, 580.

<sup>5</sup> *Benthall v. Judkins*, 13 Metc. 265; *Irish v. Cutter*, 31 Me. 526; see, also, *Wright v. Morse*, 9 Gray, 337; *Essex Company v. Edmunds*, 11 Gray, 273; *Patch v. Washburn*, 82 Mass. 82; *Bryant v. Eastman*, 7 Cush. 253; *Riley v. Gerrish*, 9 Cush. 104; *Clapp v. Rice*, 13 Gray, 403.

<sup>6</sup> *Sylvester v. Downer*, 20 Vt. 355; *Strong v. Riker*, 16 Vt. 554; see *Norton v. Hall*, 41 Vt. 471.

<sup>7</sup> *Fuller v. Scott*, 8 Kansas, 25; *Firman v. Blood*, 2 Kansas, 496.

In New Jersey, the liability of the indorser will be that of surety for the maker, or second indorser, according to the intention with which he became a party to the note.<sup>1</sup>

In Maryland, such an indorser is regarded as an original promisor, in the absence of evidence to qualify his liability.<sup>2</sup>

In Indiana, he is held liable as an indorser, but his actual relation to the maker and payee may be shown, though not to the prejudice of the holder.<sup>3</sup>

In Missouri, he is held *prima facie* as maker, but may show by parol that he in fact signed only as a guarantor or indorser.<sup>4</sup>

In Wisconsin, he is *prima facie* liable as a maker;<sup>5</sup> and in Minnesota, California, Louisiana and Oregon, as an indorser.<sup>6</sup>

In Illinois, it is presumed that a party indorsing his name on a note before delivery to the payee, and without declaring what liability he intends to incur, assumes to guarantee its payment; but if he indorses it afterwards, that he intended to become merely an assignor.<sup>7</sup> Such an indorsement in blank is authority to the holder of the note to write a guaranty over the name on the back of the note.

In Alabama, one who writes his name in blank on the back of a negotiable note before it has been indorsed

<sup>1</sup> Chaddock v. Vanness, 35 N. J. 517; S. C. 10 Am. Rep. 256.

<sup>2</sup> Walz v. Alback, 37 Md. 404.

<sup>3</sup> Houston v. Bruner, 39 Ind. 375.

<sup>4</sup> Seymour v. Farrell, 51 Mo. 95; Mammon v. Hartman, 51 Mo. 168. But see Deitz v. Corwin, 35 Mo. 376.

<sup>5</sup> Houghton v. Ely, 26 Wis. 181; S. C. 7 Am. R. 52.

<sup>6</sup> Rogers v. Stevenson, 16 Minn. 68; Jones v. Goodwin, 39 Cal. 493; Field v. New Orleans Delta, &c. Co. 21 La. An. 24; Kamin v. Holland, 2 Oregon, 59.

<sup>7</sup> White v. Weaver, 41 Ill. 409; Blatchford v. Milliken, 35 Ill. 434; Boynton v. Pierce, 79 Ill. 145; Parkhurst v. Vail, 73 Ill. 343. But see Ives v. McHard, 2 Ill. App. 176.

by the payee, is bound only as an indorser.<sup>1</sup> In Michigan, the indorser of a negotiable note before utterance is, in the absence of evidence of a different intention, held liable as a joint maker.<sup>2</sup> In West Virginia, he is liable *prima facie* as guarantor or maker, as the holder may elect.<sup>3</sup>

In Pennsylvania, it has long been held and never doubted, that when a man puts his name to the back of negotiable paper before the payee indorses it, he means to pledge, in some manner, his responsibility for the payment of it;<sup>4</sup> and the courts finally settled that, in the absence of legal evidence of any different contract, he assumes the position of a second indorser; and that, to render his engagement binding as to the holder of the note, the implied condition that the payee shall indorse before him must be complied with, so as to give him recourse against such payee.<sup>5</sup> Prior to January, 1856, when the act of April 26th, 1855, went into effect, it could, in that State, be shown by parol evidence, that the intention of the irregular indorser was to guarantee the payment of the note to the payee;<sup>6</sup> but by that act parol evidence of such guaranty is made unlawful.<sup>7</sup> In this and other States, where the obligation intended to be assumed by this irregular indorsement cannot be shown by parol, the question as to whether a contract of guaranty was in fact created, is of little importance, unless written evidence exists by which the true agreement of the parties may be established. Yet if such evidence exists, the

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<sup>1</sup> Hooks *v.* Anderson, 58 Ala. 238; S. C. 29 Am. R. 745.

<sup>2</sup> Herbage *v.* McEntee, 40 Mich. 337; S. C. 29 Am. R. 536; Rothschild *v.* Grix, 31 Mich. 150; S. C. 18 Am. R. 171.

<sup>3</sup> Burton *v.* Hansford, 10 W. Va. 470; S. C. 27 Am. R. 571.

<sup>4</sup> Kyner *v.* Shower, 13 Penn. St. 446.

<sup>5</sup> Schafer *v.* Farmers' & Mechanics' Bank, 59 Penn. St. 144.

<sup>6</sup> Leech *v.* Hill, 4 Watts, 448; Taylor *v.* McCune, 11 Penn. St. 460.

<sup>7</sup> Jack *v.* Morrison, 48 Penn. St. 113.

question as to whether the person placing his name on the back of the note intended to charge himself as a guarantor or as a second indorser, has the same importance as it had before the statute mentioned.<sup>1</sup>

In Iowa, an indorsement in blank by a stranger to a note renders him liable as a guarantor;<sup>2</sup> and it is generally held, that the indorsement of an overdue promissory note, or the indorsement in blank by a stranger to the note after its delivery to the payee, will create a similar liability.<sup>3</sup>

Under the law, as it is declared in some of the States, it may be of little consequence whether the person indorsing a promissory note in blank is to be charged as a guarantor or indorser. In *Jones v. Goodwin*,<sup>4</sup> Justice Temple says: "There seems to be no difference between the undertaking of a general guarantor and that of an indorser, except that the former, being a party to the note, his contract is construed by the law merchant, while the undertaking of the latter is construed by the general law of contracts. Each undertakes that the maker will pay the note at maturity; and, in case of being compelled to pay it for the principal, each has recourse upon his principal to recover the amount paid, and there is no good reason why they should not have equal opportunities to secure themselves from the assets of the maker. The law merchant has established what is due diligence, and what is a reasonable time within which demand and notice should be made to bind an indorser, and upon principle the

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<sup>1</sup> See *Eilbert v. Finkbeiner*, 68 Penn. St. 243; S. C. 8 Am. R. 176.

<sup>2</sup> *Veach v. Thompson*, 15 Iowa, 380. As to the rule in other States, see *Nurre v. Chittenden*, 56 Ind. 462; *Bradford v. Pauley*, 18 Kansas, 216; *Semple v. Turner*, 65 Mo. 696; *Burton v. Hansford*, 10 W. Va. 470.

<sup>3</sup> *Crooks v. Tully*, 50 Cal. 254; *Cason v. Wallace*, 4 Bush, 338; *Rey v. Simpson*, 22 How. (U. S.) 341; *Benthal v. Judkins*, 13 Met. 265; *Irish v. Cutter*, 31 Me. 536.

<sup>4</sup> *Jones v. Goodwin*, 39 Cal. 493; S. C. 2 Am. R. 437.

same diligence should be used to charge one who has assumed the same responsibility as a guarantor." In another case, the court held, that, in order to give effect to the contract created by the indorsement in blank of a non-negotiable promissory note, the construction must be that it was a joint promise or a guaranty; that in the one case the defendants were sureties, strictly so called, and in the other guarantors; and that the difference between the two, as regards the nature and extent of the obligation, is very slight, if, indeed, there exist any at all;<sup>1</sup> and in another case the liability was held to be the very same.<sup>2</sup> How far a distinction is important will appear hereafter.

### SECTION 3.—*By signatures to notes.*

In the preceding section the creation of the relation of guarantor and surety by the irregular indorsement of promissory notes has been discussed sufficiently to show that the mere addition of a name to an entirely different contract may render the person indorsing it thereon liable as a surety or guarantor.

The same relation may be created by the signing of a promissory note at the bottom where the signature of the maker is usually placed, if, at the time of the signing, it was understood and agreed that the person subscribing the note should occupy that relation.

A person signing a note is at liberty to qualify his signature by the addition of such technical or other words as are apt and effectual to indicate the intention and describe his true character and relationship to the transaction. If he does so, his obligation is measured by the words so used according to their legal import, and he is

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<sup>1</sup> *Houghton v. Ely*, 26 Wis. 181; S. C. 7 Am. R. 52.

<sup>2</sup> *Luqueer v. Prosser*, 1 Hill, 256.

not bound beyond the liability which attaches to a signature so made. He may thus make himself a guarantor or special surety for some particular party, as he pleases, or an original promisor, provided he becomes a party to the paper at the time of its inception. But if he signs without qualification or addition, he is presumed to intend what the law under the circumstances implies from such signature.<sup>1</sup>

A party cannot subsequently to the execution and delivery of a note, unless in pursuance of an arrangement at the time of the execution or delivery, become a joint promisor or maker of it. The original contract at the time of its execution and delivery is a completed and perfected instrument and in no sense an inchoate contract, and cannot, therefore, be said to be subsequently made by the addition of another signature. Such subsequent undertaking is independent of and collateral to the original, and must be construed to be either a contract of guaranty or suretyship, according to the consideration and circumstances.<sup>2</sup>

It often happens that the determination of the real character of the parties to a note gives rise to no little difficulty. When this character is ascertained, their proper legal rights and obligations can be readily affixed. The importance of determining the exact relation of the parties will be readily seen. Thus, if A. becomes the maker of a note, and B. and C. sign with him, as sureties, and the note is in that condition delivered to the payee, and afterwards D. signs the note at the request of the payee

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<sup>1</sup> *Monson v. Drakeley*, 40 Conn. 552; S. C. 16 Am. R. 74; *Sweet v. McAllister*, 4 Allen, 353.

<sup>2</sup> *Monson v. Drakeley*, 40 Conn. 552; S. C. 16 Am. R. 74; *McCaughey v. Smith*, 27 N. Y. 39; *Miller v. Gaston*, 2 Hill, 188; *Tenney v. Prince*, 4 Pick. 385; *Union Bank v. Braintree*, 8 Metc. 509; *Bentham v. Judkins*, 13 Metc. 265; *McConey v. Stanley*, 8 Cush. 85; *Stone v. White*, 8 Gray, 593; *Green v. Shepard*, 5 Allen, 590.



to give it additional security, the question as to whether D. is to be held liable as a guarantor or supplemental surety may become of grave importance, in case B. or C. is compelled to pay the note. If D. is held to occupy the position of a guarantor of the ability of the maker, he is in no sense in privity with B. and C., the sureties. His contract is collateral to theirs, and independent of it. He is not chargeable by them with contribution, neither can he claim it from them; and had he paid the note, his remedy would have been that of indemnity against A., the principal, by whose default he has been injured. If, however, he is held to occupy the position of a supplemental surety to all the prior parties, including the principal as well as the sureties, his engagement is still different. His liability in that case is to the holder, in case of default of all those parties. Like a guarantor, he is not liable to contribute to the other sureties, because his engagement extends to their responsibility as well as to that of the maker. As between himself and the other sureties, there is no mutuality; and had he been obliged to pay the note, his only remedy would have been indemnity. If he could be held as a co-surety with B. and C., his rights would differ from those possessed by him in either of the other relations. A co-surety undertakes with another to be responsible for the debt or duty of a third person. Their obligation, though several are not collateral, is for the same thing, but while they have also a right of indemnity against their principal in case they are damnified, there is generally such mutuality between them as to render the right and duty of contribution reciprocal.<sup>1</sup>

If a surety signs a joint note with the principal, and intrusts it to the latter without limit to his authority, the

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<sup>1</sup> *Monson v. Drakeley*, 40 Conn. 552; S. C. 16 Am. R. 74.

principal may obtain as many additional signatures of sureties or guarantors as may be necessary to make the paper available for the purpose intended, and these sureties and guarantors may stipulate the terms of their liability as between themselves and prior parties, and may make it a condition of their signing that they sign as sureties of the prior parties, and not as co-sureties with the prior surety.<sup>1</sup>

But the order in which signatures are placed upon a promissory note does not in itself raise any presumption as to the relation between the parties;<sup>2</sup> nor does the addition of the word "surety" after the name of a signer limit or change the nature of his liability to the payee or holder;<sup>3</sup> and the only service the addition of the word performs is to give notice to the other party of the fact, and this may in most cases as well be shown *aliunde*.<sup>4</sup>

A person may also become a surety as to a portion of the moneys for which a joint and several note is given, and a principal as to the remainder. Thus, where a sum of money is loaned to A., and an equal sum is loaned to B., and a joint and several promissory note for the whole sum loaned is given to the creditor, A. and B. are each liable as principals for one-half of the note, and are sureties for each other for the half on which they are not severally liable as principals.<sup>5</sup> So if three persons give a note for their joint debt, each is to be considered, as re-

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<sup>1</sup> Oldham v. Brown, 28 Ohio St. 41; Keith v. Goodwin, 31 Vt. 268.

<sup>2</sup> Summerhill v. Tapp, 52 Ala. 227; Paul v. Berry, 78 Ill. 158.

<sup>3</sup> Inkster v. First National Bank, 30 Mich. 143; Hubbard v. Gurney, 64 N. Y. 457, 463; Harris v. Brooks, 21 Pick. 195; Kleckner v. Klapp, 2 Watts & Serg. 44.

<sup>4</sup> Hubbard v. Gurney, 64 N. Y. 457, 463; Barry v. Ransom, 12 N. Y. 462; Rose v. Williams, 5 Kansas, 483; Piper v. Newcomer, 25 Iowa, 221; Corrielle v. Allen, 13 Iowa, 289; Reddish v. Penthouse, Wright, 538.

<sup>5</sup> Sterling v. Stewart, 74 Penn. St. 445; S. C. 15 Am. R. 559.

gards the others, as a surety for two-thirds and as principal for one-third of the amount of the note.<sup>1</sup>

The payee of a note may become presumptively a guarantor by placing his name under that of the maker long after the execution of the note and after its assignment.<sup>2</sup>

#### SECTION 4.—*By the assumption of a mortgage debt.*

The relation of principal and surety may be created as between the grantor and the grantee of mortgaged premises, by an agreement on the part of the grantee to assume the payment of the mortgage debt.

Thus where the grantee of lands assumes the payment of a mortgage then existing thereon, he becomes in equity, as between himself and the grantor, the principal debtor, and the grantor the surety;<sup>3</sup> and if a subsequent holder of the mortgage extends the time of payment without the consent of the grantor, the latter will be discharged from liability on the mortgage.<sup>4</sup>

So where the real estate of the wife is mortgaged to secure the debt of her husband, she occupies the position of a surety, and she, and those claiming under her, are entitled to the benefit of the rules prohibiting the dealing of the creditor with the principal debtor to the prejudice of the surety.<sup>5</sup> And so where lands incumbered by a

<sup>1</sup> Henderson v. McDuffee, 5 N. H. 38.

<sup>2</sup> Cason v. Wallace, 4 Bush (Ky.), 338.

<sup>3</sup> Paine v. Jones, 76 N. Y. 274; Comstock v. Drohan, 71 N. Y. 9; Russell v. Pistor, 7 N. Y. 171; Halsey v. Reed, 9 Paige, 446; Marsh v. Pike, 10 Paige, 595, 597; Cornell v. Prescott, 2 Barb. 16; Blyer v. Monholland, 2 Sand. Ch. R. 478; Ferris v. Crawford, 2 Denio, 595; Meyer v. Lathrop, 10 Hun, 66; Calvo v. Davies, 73 N. Y. 211; S. C. 8 Hun, 222; Klapworth v. Dressler, 2 Beasley (N. J.), 62; Hoysradt v. Holland, 50 N. H. 433; Ayres v. Dixon, 78 N. Y. 318.

<sup>4</sup> Calvo v. Davies, 8 Hun, 222; S. C. 73 N. Y. 211; Paine v. Jones, 76 N. Y. 274, and cases cited in preceding note.

<sup>5</sup> Bank of Albion v. Burns, 46 N. Y. 170; Spear v. Ward, 20 Cal. 674;

judgment are conveyed with covenants of warranty for full value, the grantee and his successors in interest, though not technically sureties for the judgment debtor, occupy a similar relation, and are entitled to the same equities.<sup>1</sup>

So, too, if a mortgagor conveys a part of the mortgaged premises subject to the whole mortgage, the part sold first is liable for the debt; that is, it becomes the principal debtor, and the mortgagee must exhaust it before he can seek the other property of the mortgagor, who has become in equity the surety.<sup>2</sup>

If, on the purchase of lands, the grantee promise the grantor to pay a mortgage debt as part of the purchase-money of the land conveyed, this does not render the grantee the surety for the grantor, but, as between themselves, the grantee is the principal debtor and the grantor the surety.<sup>3</sup>

#### SECTION 5.—*By the assumption of partnership liabilities.*

Where one partner, on the dissolution of the firm, assumes the payment of debts of the firm, the other partner, becomes a mere surety for his copartner, although, as between them and the firm creditors, they may both be liable as principals.<sup>4</sup> So if a member of a copartnership transfers his interest therein to a third person who is received into the firm as a partner in his stead, he thereafter occupies the position of surety for the firm debts to the extent that the assets of the firm

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Loomis v. Wheelwright, 3 Sandf. Ch. 155; Hassey v. Wilke (Cal. Sup. Ct.), not yet reported.

<sup>1</sup> Barnes v. Mott, 64 N. Y. 397.

<sup>2</sup> Halsey v. Reed, 9 Paige, 446; Trotter v. Hughes, 12 N. Y. 74, 79.

<sup>3</sup> Huyler v. Atwood, 26 N. J. Eq. 504.

<sup>4</sup> Conwell v. McCowan, 81 Ill. 285; Smith v. Sheldon, 35 Mich. 42; s. c. 24 Am. R. 529; Burnside v. Fetzner, 63 Mo. 90; Millerd v. Thorn, 56 N. Y. 402; Colgrove v. Tallman, 67 N. Y. 95; s. c. 23 Am. R. 90.

are sufficient for their payment.<sup>1</sup> If a firm creditor, with knowledge of these facts, makes a valid agreement with the principal debtor to extend the time of payment of the firm debt, he thereby discharges the surety.<sup>2</sup>

SECTION 6.—*By contracting a joint liability.*

Parties may also, by joining in the execution of a bond or other obligation, become sureties for each other, although they are both principals as to third parties.

Where two persons, administrators of the same estate, join, with others as sureties, in executing a bond for the faithful discharge of their duties, each of such administrators will be held as surety for the other.<sup>3</sup>

When a promissory note is executed by two persons, and each receives one-half of the consideration, they are each, as between themselves, sureties for each other to the extent of one-half of the amount of the note, and principals as to the other half.<sup>4</sup>

And generally all the principal obligors in a joint bond are, as between themselves, sureties for each other.<sup>5</sup>

<sup>1</sup> *Morss v. Gleason*, 64 N. Y. 204; *Savage v. Putnam*, 32 N. Y. 501.

<sup>2</sup> *Millerd v. Thorn*, 56 N. Y. 402; *Oakeley v. Pasheller*, 10 Bligh's New Parliamentary Rep. 548; *Smith v. Shelden*, 35 Mich. 42.

<sup>3</sup> *Moore v. State*, 40 Ind. 558; *Morrow's Admr. v. Peyton's Admr.* 8 Leigh, 54; *Collins v. Carlisle*, 7 B. Mon. 13; *Boyd v. Boyd*, 3 Gratt. 113; *Braxton v. State*, 25 Ind. 82; *Newton v. Newton*, 53 N. H. 537; *Moore v. State*, 49 Ind. 558.

<sup>4</sup> *Hall v. Hall*, 34 Ind. 314.

<sup>5</sup> *Hatch v. Norris*, 36 Me. 419.

## CHAPTER III.

### WHO MAY BECOME GUARANTORS OR SURETIES.

Section 1.—Married women.

2.—Corporations.

3.—National banks.

4.—Copartners.

5.—Attorneys.

6.—Infants.

#### SECTION 1.—*Married women.*

At common law, a married woman could not bind herself by entering into a contract of guaranty or suretyship, as the disability of coverture attached to these contracts as well as to others.

By the statutes of many of the States, married women are allowed to enter into contracts in respect to their separate estates, subject generally to certain restrictions; and, in some States, the power to enter into contracts of suretyship has been, either expressly or impliedly, conferred by statute. Where these enabling acts exist, the question whether a married woman has bound herself as a surety is to be determined by the form of her contract, and its relation to her separate estate or business.

Thus, under the New York statutes, a married woman is bound by her contracts made in her separate business or relating to her separate estate; and they may be enforced against her at law or in equity. But if her contracts are not thus made, or do not thus relate, they are void at law, and cannot be enforced in equity against her separate estate, unless the intention of charging that estate is expressed in the contract, or implied from its

terms.<sup>1</sup> Therefore, in that State, a married woman is not liable on a guardian's bond executed by her as surety, when there is nothing expressed in the instrument showing an intent to charge her separate estate.<sup>2</sup> Under the same statutes, it is held that a married woman is not liable upon a promissory note signed by her as surety for another, or upon one given in renewal thereof, although she has a separate estate, where there is nothing to show a charge, or an intent to charge such estate, or that her estate was benefitted, and no evidence, except by implication, to show that the note was given upon the credit of such estate;<sup>3</sup> and that the indorsement of a promissory note by a married woman, at the request of her husband, for his benefit, without any benefit to her separate estate, is void.<sup>4</sup>

At common law, a married woman cannot become bound by a recognizance because it is not capable of being estreated;<sup>5</sup> and if capable, under the enabling acts, to enter into a recognizance as surety, she can only bind her separate estate, and that she does so must be expressed in the instrument.

Under the enabling acts, a married woman may, by a contract expressing an intent to charge her separate estate, bind herself as a surety or guarantor of the obligation of another, as if she were sole;<sup>6</sup> and she may, in all cases, make a contract as principal, which, if void at

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<sup>1</sup> *Yale v. Dederer*, 22 N. Y. 450; 68 N. Y. 329.

<sup>2</sup> *Gosman v. Cruger*, 69 N. Y. 87.

<sup>3</sup> *Hanse v. De Witt*, 63 Barb. 53; *Bogert v. Gulick*, 65 Barb. 322; 45 How. (N. Y.) 385.

<sup>4</sup> *Phillips v. Wicks*, 45 How. (N. Y.) 477. The effect of such indorsement is merely to transfer the title of the note to the purchaser. *Moreau v. Bronson*, 37 Ind. 195. But see *Flanders v. Abbey*, 6 Biss. 16.

<sup>5</sup> *Bennett v. Watson*, 3 M. & Selw. 1; *Petersdorff on Bail*, 506.

<sup>6</sup> *Corn Exchange Ins. Co. v. Babcock*, 42 N. Y. 613; *Hier v. Staples*, 51 N. Y. 136; *Woolsey v. Brown*, 11 Hun, 52; S. C. 74 N. Y. 82; see *Mayo v. Hutchinson*, 57 Me. 546; *Low v. Anderson*, 41 Iowa, 476.

law, by reason of her coverture, will notwithstanding be binding upon her surety.<sup>1</sup>

In some States, a wife may become surety for her husband, by joining with him in a mortgage on her separate estate to secure his debt;<sup>2</sup> and in other States she cannot.<sup>3</sup>

The Georgia Code declares, that, while the wife may contract, she cannot bind her separate estate by any contract of suretyship, nor by any assumption of the debts of her husband; and any sale of her separate estate made to a creditor of her husband, in extinguishment of his debt, shall be absolutely void.<sup>4</sup>

Under the laws in force in Illinois, in 1870, a married woman had no power to become a surety for her husband upon a debt or liability he might incur.<sup>5</sup> So, under the statutes of Michigan, she has no general capacity to contract, and can only make such contracts as relate to her own property; she cannot become personally liable except on account of her own matters; and cannot enter into an undertaking jointly with her husband merely as his surety.<sup>6</sup> And, in Massachusetts and New

<sup>1</sup> *McGavock v. Whitfield*, 45 Miss. 452; and see *Smyley v. Head*, 2 Rich. L. (S. C.) 590; *St. Albans Bank v. Dillon*, 30 Vt. 122; *Jones v. Crosthwaite*, 17 Iowa, 393; *Weed Sewing Machine Co. v. Maxwell*, 63 Mo. 486; *Davis v. Statts*, 43 Ind. 103.

<sup>2</sup> *Purvis v. Carstaphan*, 73 N. C. 575; *Wilcox v. Todd*, 64 Mo. 388; *Short v. Battle*, 52 Ala. 456; *Rhodes v. Gibbs*, 39 Texas, 432; *Jordan v. Peak*, 38 Texas, 429; *Hubble v. Wright*, 23 Ind. 322; *Haffey v. Carey*, 73 Penn. St. 431; *Muller v. Bayly*, 21 Gratt. (Va.) 521; *McFerrin v. White*, 6 Coldw. (Tenn.), 499.

<sup>3</sup> *Northington v. Faber*, 52 Ala. 45; *Dunbar v. Mize*, 53 Ga. 435; *Stribling v. Bank of Kentucky*, 48 Ala. 451; *Bibb v. Pope*, 43 Ala. 190; *Hartman v. Ogborn*, 54 Penn. St. 120.

<sup>4</sup> Georgia Code, § 1783. In Mississippi, a married woman may mortgage her separate estate in lands to secure the payment of her husband's debts, but the incumbrance reaches only to the rents and profits, and does not affect the fee. *Foxworth v. Magee*, 44 Miss. 430.

<sup>5</sup> *Doyle v. Kelly*, 75 Ill. 574.

<sup>6</sup> *West v. Laraway*, 28 Mich. 464.



Jersey, it is held that a married woman cannot charge her separate estate by a contract of suretyship, unless in consideration of a benefit to herself or her estate, whether such estate was created by deed or will, or exists by force of the statutes relating to the property of married women.<sup>1</sup> In Maine, a wife is not liable as a surety for her husband on a promissory note.<sup>2</sup> In Louisiana, a married woman, by complying with the act enabling married women to contract debts, may bind her separate estate by an engagement to pay the debt of her husband.<sup>3</sup>

The Indiana statutes have not changed the common law rule, that a wife is incapable of binding herself by an executory contract.<sup>4</sup>

In Iowa, a married woman may make a valid mortgage on her lands to secure the payment of a note made by her husband, upon which she is surety, but her general property cannot be applied against her consent to its payment.<sup>5</sup>

It would be idle, in this connection, to attempt to give any rule or test by which to determine how far a married woman might bind herself as a guarantor or surety in any State where enabling acts exist. These statutes have been so frequently amended, have so little

<sup>1</sup> *Perkins v. Elliott*, 23 N. J. Eq. 526 ; *Athol, &c. Machine Co. v. Fuller*, 107 Mass. 437 ; *Willard v. Eastham*, 15 Gray, 328.

<sup>2</sup> *Sawyer v. Fernald*, 59 Me. 500. But see *Mayo v. Hutchinson*, 57 Me. 546.

<sup>3</sup> *Keller v. Ruiz*, 21 La. Ann. 283. She may also, with her husband's consent, bind herself as a surety for a third person. *Wickliffe v. Dawson*, 19 La. Ann. 48.

<sup>4</sup> *O'Daily v. Morris*, 31 Ind. 111 ; *Stevens v. Parish*, 29 Ind. 260 ; *Coats v. McKee*, 26 Ind. 223.

<sup>5</sup> *Wolf v. Van Metre*, 23 Iowa, 297. It is held, in Massachusetts, that the fact that a note given for the husband's indebtedness, and signed by him and his wife, is secured by a mortgage on her lands, does not render her liable on the note. *Heburn v. Warner*, 112 Mass. 271 ; *Williams v. Hayward*, 117 Mass. 532.

in common with each other, and are construed so differently, that the decisions of one State are of little value in others.

### SECTION 2.—*Corporations.*

A corporation may have no legal capacity to enter into a contract of guaranty or suretyship, either by reason of an express prohibition contained in its charter, or by reason of a want of power conferred upon it to make such contracts.

Thus, a banking corporation organized under the general banking laws of the State of New York, exceeds its powers when it becomes a mere surety for another upon a contract in which it has no interest, or lends its credit in any form for the exclusive benefit of other parties. Such contracts are *ultra vires*, and cannot be enforced against the bank by any person cognizant of the facts.<sup>1</sup> The authority of the governing officers of a corporation to affect it by a contract in its name, is of the same general character as that which a partner has to bind the firm. In either case, if they contract in a matter to which the business of the corporation or partnership does not extend, their engagements are invalid as against the corporation or partnership for want of authority to conclude those in whose behalf they assume to act.<sup>2</sup>

But there is a manifest distinction between the right of a bank to guaranty choses in action belonging to it, and its right to guaranty those belonging to another. A bank may assign or convey any property held by it, and may enter into the common covenants of guaranty or warranty on making such assignment or conveyance.<sup>3</sup>

<sup>1</sup> Farmers' and Mechanics' Bank v. Butchers' and Drovers' Bank, 16 N. Y. 125.

<sup>2</sup> Bank of Genesee v. Patchin Bank, 13 N. Y. 309.

<sup>3</sup> Talman v. Rochester City Bank, 18 Barb. 123.

But, while a corporation may not have power to loan its credit, it may not be in a condition to interpose that want of power as a defense where a loan of credit has actually been made. The note of a manufacturing corporation, in the hands of a holder in good faith for value, who took it before maturity, and without any knowledge that the makers had not received the full consideration, can be enforced against the corporation, although it was made as an accommodation note.<sup>1</sup> This is upon the ground that when the transaction is not the exercise of a power not conferred on a corporation, but the abuse of a general power in a particular instance, the abuse not being known to the other contracting party, the doctrine of *ultra vires* does not apply.

### SECTION. 3.—*National banks.*

The power of corporations generally to become sureties or guarantors has been considered in the preceding section, and much that is there stated is applicable to the limit of the power of national banks to enter into such contracts.

The authority given to these corporations under the act of Congress "to provide a national currency," etc., so far as it is material to this question, is to exercise all such

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<sup>1</sup> Monument National Bank *v.* Globe Works, 101 Mass. 57; S. C. 3 Am. R. 322; Bird *v.* Daggett, 97 Mass. 494. Where a railroad corporation, in pursuance of an agreement with a similar corporation, guarantees the payment of the interest coupons on the bonds of the latter, and subsequently becoming the owner of the bonds, transfers them, with the guaranty indorsed thereon uncanceled, to a purchaser for value, the purchaser may enforce the guaranty, although, when made, it was *ultra vires*, it being presumed that the guaranty was intended to be and was taken by the purchaser as additional security and as part of the purchase. The fact that the guaranty was not written at the time of the transfer, and that the true consideration of the guaranty was not expressed therein will not defeat the recovery. Arnot *v.* Erie Railway Co. 67 N. Y. 315.

incidental powers as shall be necessary to carry on the business of banking by discounting and negotiating promissory notes, bills of exchange and other evidences of debt, by receiving deposits, by buying and selling exchange, coin and bullion, by loaning money on personal security, and by obtaining, issuing and circulating notes according to the provisions of the act.<sup>1</sup> What a national bank may do is defined by the statute of which it is the creature; and this statute gives such bank no authority to purchase a promissory note for the purpose of speculation,<sup>2</sup> nor does it authorize the bank to loan its credit and become an accommodation indorser.<sup>3</sup> But a national bank upon making a transfer, for value, of certain notes belonging to it, has power to indorse the notes and guarantee the payment of principal and interest, and having exercised the power, will be bound by the guaranty.<sup>4</sup> A guaranty is not, however, a negotiation of a bill or note as understood by the law merchant.<sup>5</sup> To negotiate a promissory note or bill of exchange, is either to

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<sup>1</sup> U. S. Rev. Stat. § 5136

<sup>2</sup> First National Bank of Rochester *v.* Pierson, 24 Minn. 140; 31 Am. R. 341; but see National Pemberton Bank *v.* Porter, 125 Mass. 333; S. C. 28 Am. R. 235.

<sup>3</sup> National Bank of Gloversville *v.* Wells, 79 N. Y. 498.

In the case last cited, the court says: "The counsel have elaborately argued another question, viz, whether a national bank can loan its credit and become an accommodation indorser of a promissory note. If material to the decision of this case, I should have no hesitation in denying this proposition. Such a transaction as is here disclosed on the part of the plaintiff, is clearly outside of its corporate powers. If a bank may charge a compensation for loaning its credit and procuring another bank to discount the paper of its customers, it would practically abrogate all restraints imposed by the usury clause of the national bank act. \* \* \* But it is unnecessary to decide whether this matter constitutes a defense."

<sup>4</sup> Peoples' Bank of Belleville *v.* Manufacturers' National Bank of Chicago, U. S. Sup. Ct., 21 Alb. Law J. 276.

<sup>5</sup> Central Trust Co. of New York *v.* First Nat. Bank of Wyandotte, U. S. Sup. Ct. 21 Alb. Law J. 214.

buy or to sell it; and a guaranty by a national bank of a note or bill, as a mere loan of credit to another, disconnected with any transfer of title therein by the bank, or any ownership of the paper guaranteed, is without the authority conferred by the statute. The act conferring upon such banks a corporate existence, authorizes them to loan money upon personal security; but it must be money that they loan, and not their credit.<sup>1</sup>

#### SECTION 4.—*Copartners.*

One member of a copartnership, by virtue of his being the general agent of the firm, has authority to bind the firm by a contract of guaranty, if such contract is within the scope of the business of the copartnership, notwithstanding any understanding between the partners in respect to such transactions.<sup>2</sup> If one partner has been authorized by his copartner to borrow money for the firm and has been allowed by them to fill up notes over their blank signatures, and to sign the names of members of the firm to obligations, he may bind the other members of the firm by a contract of guaranty, signed by him in their names, and indorsed on a note given by him for money borrowed for the firm.<sup>3</sup>

A contract of suretyship, signed by one partner in the name of the firm, without authority, may become valid by the subsequent ratification of the firm,<sup>4</sup> although ineffectual as against existing partnership creditors.<sup>5</sup>

It is well settled that one partner cannot bind his associates by affixing his signature in the name and style of

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<sup>1</sup> *Seligman v. Charlottesville National Bank*, U. S. Cir. Ct. W. D. Va., 21 Alb. Law J. 196.

<sup>2</sup> *First National Bank v. Carpenter*, 41 Iowa, 518.

<sup>3</sup> *Pahlman v. Taylor*, 75 Ill. 629.

<sup>4</sup> *Kidder v. Page*, 48 N. H. 380; *Cockroft v. Clafin*, 64 Barb. 464.

<sup>5</sup> *Kidder v. Page*, 48 N. H. 380.

the firm, to an instrument under seal. To make such a transaction binding, it must appear that there was either a previous authority, or a subsequent ratification on the part of the other partners, adopting the signature as binding on them.<sup>1</sup> Partners may, however, give each other authority by parol, to bind each other by instruments under seal;<sup>2</sup> and a bond executed in the firm name by an individual partner, may become obligatory on the other partners upon the principle of estoppel or ratification, though, originally, the other partners might have had a good defense to an action on the instrument on the ground that one partner cannot bind his firm by a sealed instrument.<sup>3</sup>

A partner has, as partner, no implied authority to guarantee a debt in which the creditor knows the firm has no interest;<sup>4</sup> and a promise by one partner, that the firm will pay the debt of a third person, is not binding on his copartners.<sup>5</sup> One of the partners in a commercial copartnership, has no authority to bind the firm as sureties on the paper of other persons.<sup>6</sup> They may, however, become liable by a subsequent ratification of the act.

A firm may become the surety of another firm in the

<sup>1</sup> *Russell v. Annable*, 109 Mass. 72; *Cady v. Shepherd*, 11 Pick. 400; *Van Deusen v. Blum*, 18 Pick. 229; *Swan v. Stedman*, 4 Met. 548; *Dillon v. Brown*, 11 Gray, 179.

<sup>2</sup> *Wilson v. Hunter*, 14 Wis. 383; *Fox v. Norton*, 9 Mich. 207; but see *Snyder v. May*, 19 Penn. 235.

<sup>3</sup> *Mann v. Aetna Ins. Co.* 40 Wis. 549.

<sup>4</sup> *Selden v. Bank of Commerce*, 3 Minn. 166; *Sutton v. Irwine*, 12 S. & R. 13; *Hamill v. Purviss*, 2 Penn. 177; *Laverty v. Burr*, 1 Wend. 529.

<sup>5</sup> *McQuewans v. Hamlin*, 35 Penn. St. 517; see *Bell v. Faber*, 1 Grant's Cases, 31; *Tutt v. Addams*, 24 Mo. 186.

<sup>6</sup> *Rollins v. Stevens*, 31 Me. 454; *Sweetser v. French*, 2 Cush. 309; *Langan v. Hewett*, 13 S. & M. 122; *Chenoweth v. Chamberlain*, 6 B. Mon. 60; *Andrews v. Planters' Bank*, 7 S. & M. 192; *M'Guire v. Blanton*, 5 Humph. 361; *Schermerhorn v. Schermerhorn*, 1 Wend. 119; *Rolston v. Click*, 1 Stew. 526; *Foot v. Sabin*, 19 Johns. 154; *Bank of Rochester v. Bowen*, 7 Wend. 158.

same manner that one individual may become surety for another.<sup>1</sup>

### SECTION 5.—*Attorneys.*

In some States attorneys are not allowed to become sureties in the undertakings of their clients in civil cases, or to become bail in criminal cases.

A statute providing that no attorney shall be received as bail in a criminal case, is constitutional,<sup>2</sup> but merely directory; and if the attorney is received as bail, notwithstanding the statute, he will be bound by his contract.<sup>3</sup> A rule prohibiting attorneys at law from becoming sureties in attachment, appeal, etc., does not prohibit them from executing bonds or undertakings as principals in behalf of parties.<sup>4</sup>

Under the Wisconsin statutes an attorney at law, practicing in any county of the State, is absolutely disqualified from becoming surety in any undertaking in any action.<sup>5</sup>

The general rule of practice of the courts of record of the State of New York, prohibiting an attorney from becoming surety on any undertaking or bond required by law or by any rule or order of a court or judge does not apply to justices' courts.<sup>6</sup>

### SECTION 6.—*Infants.*

Contracts of guaranty or suretyship, when made by infants, are sometimes held to be voidable, but not void ;

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<sup>1</sup> Allen v. Morgan, 5 Humph. 624.

<sup>2</sup> Johnson v. Commonwealth, 2 Duval (Ky.), 410.

<sup>3</sup> Sherman v. State, 4 Kans. 570; Jack v. People, 19 J. 57; Holandsworth v. Commonwealth, 11 Bush (Ky.), 617.

<sup>4</sup> Cunningham v. Tucker, 14 Fla. 251.

<sup>5</sup> Gilbank v. Stephenson, 30 Wis. 155; Branger v. Buttrick, 30 Wis. 153.

<sup>6</sup> Lawler v. Van Aernam, Buffalo Superior Ct., 22 Alb. Law J. 156.

and to be capable of ratification after majority by some distinct act amounting to a ratification with full knowledge of the want of binding effect of the contract.<sup>1</sup>

In other cases contracts of suretyship entered into by infants, have been held manifestly and necessarily prejudicial to the infant, and consequently void.<sup>2</sup> Thus a mortgage given by a wife, while an infant, to secure her husband's debt, has been held absolutely void.<sup>3</sup> So, a promissory note executed by an infant as a surety for another, has been held to be manifestly against the interest of the infant, and therefore void.<sup>4</sup>

The same legal tests in determining the capacity of parties to contracts will not be applied in all cases, to this as to other classes of contracts.<sup>5</sup>

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<sup>1</sup> *Owen v. Long*, 112 Mass. 403; *Hinely v. Margaritz*, 3 Penn. St. 428; *Fetrow v. Wiseman*, 40 Ind. 148.

<sup>2</sup> *Robinson v. Weeks*, 56 Me. 102.

<sup>3</sup> *Chandler v. McKinney*, 6 Mich. 217.

<sup>4</sup> *Maples v. Wightman*, 4 Conn. 376.

<sup>5</sup> See *Causey v. Wiley*, 27 Ga. 444.



## CHAPTER IV.

### CONSIDERATION.

- Section 1.—Consideration indispensable.
- 2.—When the consideration of the principal contract is sufficient.
  - 3.—When a consideration independent of that of the original contract is necessary.
  - 4.—Contracts entered into under a prior agreement.
  - 5.—From whom and to whom the consideration must move.
  - 6.—Sufficiency of the consideration.
  - 7.—Statutory undertakings.

#### SECTION 1.—*Consideration indispensable.*

Another essential to a valid contract of guaranty or suretyship common to all other contracts is the existence of a sufficient legal consideration. Contracts of this character, if made without consideration, are absolutely void.<sup>1</sup>

It is not, however, essential that the consideration of the contract should be a benefit moving to the surety or guarantor. The consideration may consist either in some benefit to the promisor or to some other person at his request, or, in some trouble or detriment, to the promisee.<sup>2</sup>

#### SECTION 2.—*When the consideration of the principal contract is sufficient.*

There is a wide difference between the guaranty of an existing debt and the guaranty of a debt to be con-

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<sup>1</sup> Starr v. Earle, 43 Ind. 478. Want of consideration for the guaranty will not affect the right of an innocent holder for value, and without notice. Stone v. Bond, 2 Heisk. (Tenn.) 425.

<sup>2</sup> Union Bank v. Coster's Executors, 3 N. Y. 202; Smith v. Weed, 20 Wend. 184; Watson v. Randall, 20 Wend. 201; Morley v. Boothby, 10 Moore, 395.

tracted upon the credit of the guaranty. It is the difference between a past and a future consideration. A past consideration, unless advanced at the request of the promisor, is not sufficient to support any promise. But a promise to do an act in consideration of some act to be done by the promisee, implies a request, and a compliance on the part of the latter closes the transaction and makes the contract binding.<sup>1</sup> So, too, so far as the nature and sufficiency of the consideration is concerned, there is a broad distinction between guaranties of contracts created at the same time as the guaranty, and guaranties of contracts which were made prior to the guaranty.<sup>2</sup>

It will be found upon an examination of the reported cases relating to the consideration of contracts of this nature, that they naturally arrange themselves into three classes. In the first are those cases in which the guaranty or promise is collateral to the principal contract, but is made at the same time, and becomes an essential ground of the credit given to the principal debtor; in the second are those cases in which the collateral undertaking is subsequent to the creation of the debt, and was not the inducement to it, though the subsisting liability is the ground of the promise, without any distinct and unconnected inducement; and in the third are those cases in which the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the newly contracting parties.<sup>3</sup>

It is well settled that no new consideration is necessary to support a guaranty of a note given at the time of its execution, and so made a part of the original transac-

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<sup>1</sup> Union Bank *v.* Coster's Executors, 3 N. Y. 202.

<sup>2</sup> See *post*, 56.

<sup>3</sup> See Leonard *v.* Vreedenburgh, 8 Johns. 28.

tion, as the credit given to the principal debtor forms the consideration for the guaranty.<sup>1</sup>

This doctrine is equally applicable to contracts of suretyship. Thus where a contract of suretyship is not in the form of an independent contract, as, for example, where a note is signed by a surety in form as a joint maker, the surety will be liable on his contract, although no consideration moved to him.<sup>2</sup> So where a principal and surety join in the execution of a deed of trust, the consideration of the principal's contract is a sufficient consideration for the contract of the surety.<sup>3</sup>

A debtor may, with the consent of his creditor, turn out to the latter, in satisfaction of his demand, the obligation of a third person with a guaranty of its payment.<sup>4</sup> And a corporation may bind itself by a guaranty of the bonds of another corporation, made in pursuance of a prior agreement, if it subsequently transfers these bonds with the guaranties uncanceled to a purchaser for value, even though the guaranties were *ultra vires* when made, and the true consideration not expressed therein.<sup>5</sup>

Mutual promises, by persons competent to contract, to submit to arbitration claims and demands which are the subjects of arbitration, are a good consideration each for the other; and a submission being obligatory, a guaranty of the performance of the award, executed concurrently with the submission, is binding also.<sup>6</sup>

<sup>1</sup> *Joslyn v. Collinson*, 26 Ill. 61; *McNaught v. McClaughey*, 42 N. Y. 22; S. C. 1 Am. R. 487; *Parkhurst v. Vail*, 73 Ill. 323; *Clopton v. Hall*, 51 Miss. 482; *Brewster v. Silence*, 8 N. Y. 207; *Leonard v. Vreedenburgh*, 8 Johns. 28; *Green v. Thornton*, 4 Jones Law (N. C.), 230; *Rich v. Hathaway*, 18 Ill. 548.

<sup>2</sup> *Crawford v. Shaw*, 18 Ind. 495; *Brokaw v. Kelsey*, 20 Ill. 303.

<sup>3</sup> *Henderson v. Rice*, 1 Cold. (Tenn.) 223.

<sup>4</sup> *Railroad Co. v. Howard*, 7 Wall. 392.

<sup>5</sup> *Arnot v. Erie Railway Co.* 67 N. Y. 315.

<sup>6</sup> *Wood v. Tunncliffe*, 74 N. Y. 38.

SECTION 3.—*When a consideration independent of that of the original contract is necessary.*

Whenever a guaranty of a note or other obligation is made subsequent to the execution of the principal contract, and not in pursuance of any prior agreement, a new consideration is indispensable to support the guaranty.<sup>1</sup> So where a person signs a note as surety after its delivery, the transaction constitutes a separate agreement, and must be supported by a consideration other than that imported by the note itself.<sup>2</sup> Thus if a person on obtaining a loan of money gives his promissory note, which is accepted by the payee named therein unconditionally, and before the maturity of the note the maker procures another person to sign the same as surety, the contract of the surety is void, but not because there was no direct consideration moving to the surety, but because there was no sufficient consideration moving to his principal.<sup>3</sup>

SECTION 4.—*Contracts entered into under a prior agreement.*

A contract of guaranty or suretyship entered into after the execution of the principal contract, but in pursuance of an agreement entered into at the time of the execution of the principal contract, is based upon a valid consideration, and the guarantor or surety is liable, although he in fact received no consideration at the time of the execution of his contract.<sup>4</sup>

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<sup>1</sup> *Joslyn v. Collinson*, 26 Ill. 61; *Greer v. Jones*, 7 Jones Law (N. C.), 581; *Good v. Martin*, 95 U. S. 90; *Ware v. Adams*, 11 Shep. 177; *Jones v. Ritter*, 32 Texas, 717; *Parkhurst v. Vail*, 73 Ill. 323.

<sup>2</sup> *Clopton v. Hall*, 51 Miss. 482.

<sup>3</sup> *McNaught v. McClaughey*, 42 N. Y. 22, 25.

<sup>4</sup> *McNaught v. McClaughey*, 42 N. Y. 22; *Moies v. Bird*, 11 Mass. 436; *Standley v. Miles*, 36 Miss. 434.

The selling of goods is a good consideration for a previous guaranty of the price;<sup>1</sup> and advances to be made constitute a good consideration for the guaranty of the payment of past and future advances.<sup>2</sup> So the guaranty of the bonds of a railroad company by another company, in pursuance of a prior agreement, may be valid when transferred with the bonds to a purchaser for value, though the guaranties, when made, were *ultra vires*.<sup>3</sup>

SECTION 5.—*From whom and to whom the consideration must move.*

“Suretyship upon promissory notes may be made in various forms, as by becoming an undersigner, an indorser or formal guarantor. In every form the existence of a sufficient consideration between the maker and the lender establishes a sufficient consideration also as against the surety. In practice there is usually no communication between the lender and the surety. The business is transacted between the principals alone. A borrower applies to a bank for a loan, offering to furnish the name of his friend as security, or presents, in the first instance, a note so indorsed. It is neither customary nor necessary for the bank to investigate the relations existing between or the motives operating upon the different parties. It is enough that it is the fact that the one is willing to become surety for the other. In inquiring into the consideration, we inquire, therefore, only so far as to ascertain that a sufficient consideration exists between the principals in the transaction.”<sup>4</sup>

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<sup>1</sup> Eastman v. Bennett, 6 Wis. 232.

<sup>2</sup> Hargroves v. Cooke, 15 Ga. 321.

<sup>3</sup> Arnot v. Erie Railway Co. 67 N. Y. 315.

<sup>4</sup> McNaught v. McClaughey, 42 N. Y. 25, *per* Hunt, J.

If, after a note has been accepted by the lender, the maker gratuitously procures an additional indorser, the indorser is not bound, not because there was no direct consideration moving to himself, but because there was no sufficient consideration moving to his principal.<sup>1</sup>

A guaranty without the request of the debtor has no consideration as to him.<sup>2</sup>

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### SECTION 6.—*Sufficiency of the consideration.*

As to the sufficiency of the consideration it may be stated generally, that whatever would be a sufficient consideration for any other contract, will be a sufficient consideration for a contract of guaranty or suretyship. Any act in the nature of a benefit to the person who promises, or to any other person at his request, is a sufficient consideration for the promise.<sup>3</sup>

Thus the indorsement of a promissory note is a sufficient consideration for a promise to guarantee the debt of another;<sup>4</sup> and the leaving of a demand in the hands of an attorney to control and collect is a sufficient consideration for a cotemporaneous guaranty of the claim by the attorney.<sup>5</sup> So the consideration may consist in an agreement to withdraw, and the subsequent withdrawal of a suit against the maker of a note,<sup>6</sup> or in a forbearance to sue.<sup>7</sup>

The mere transfer of a promissory note is a sufficient

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<sup>1</sup> *McNaught v. McClaughey*, 42 N. Y. 22.

<sup>2</sup> *Kean v. McKinsey*, 2 Barr. 30.

<sup>3</sup> *Williams v. Marshall*, 42 Barb. 524.

<sup>4</sup> *Saunders v. Gillespie*, 64 Barb. 628.

<sup>5</sup> *Gregory v. Glead*, 33 Vt. 405.

<sup>6</sup> *Worcester Mechanics' Savings Bank v. Hill*, 113 Mass. 25; see *Duffy v. Wunsch*, 8 Abb. N. S. 113; *Thomas v. Delphy*, 33 Md. 373.

<sup>7</sup> *Smith v. Finch*, 2 Scam. 321; *Sage v. Wilcox*, 6 Conn. 81; *Hockenbury v. Myers*, 34 N. J. L. 347; *McCleary v. Noble*, 13 Rich. (S. C.) L. 330; *Calkins v. Chandler*, 36 Mich. 320.

consideration for a guaranty of its payment made at the time of the transfer.<sup>1</sup>

If a policy of insurance is assigned with the assent of the company, and the company, as a condition of giving such assent, require the assignee to guarantee the premium note of the assignor, the assent of the company will furnish a sufficient consideration for the guaranty.<sup>2</sup> So if a person agrees to pay a physician for services rendered to another during an entire sickness, including services rendered as well as such as may thereafter be rendered, if the physician will continue his professional attendance, the rendition of the services during the entire illness will be a good consideration for the promise to pay for the entire services rendered.<sup>3</sup> So if a person agrees to release a lien on lands for the payment of a debt in consideration of a guaranty of the debt by another, the release will be a sufficient consideration to uphold the guaranty.<sup>4</sup>

Past favors or benefits already conferred are not of themselves a sufficient consideration for a guaranty.<sup>5</sup>

A guaranty which was upon a sufficient consideration when made, does not fail by the subsequent loss of value of the consideration.<sup>6</sup>

### SECTION 7.—*Statutory undertakings.*

Undertakings given in judicial proceedings differ in some particulars from ordinary contracts of suretyship. Ordinarily the consideration upon which an agreement rests is a matter of arrangement between the parties, and forms one element of the contract itself. If the agree-

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<sup>1</sup> How v. Kemball, 2 McLean, 103; Gillighan v. Boardman, 29 Me. 79.

<sup>2</sup> New England Marine Ins. Co. v. De Wolf, 8 Pick. 56.

<sup>3</sup> Bagley v. Moulton, 42 Vt. 184.

<sup>4</sup> Killiam v. Ashley, 24 Ark. 511.

<sup>5</sup> Ware v. Adams, 11 Shep. 177.

<sup>6</sup> Mordecai v. Gadsden, 2 Speers, 566.

ment is executed by one of the parties only, its delivery to the other, and his acceptance of it, is evidence of his assent thereto, and the instrument becomes mutually obligatory. This is not the case with statutory undertakings. The party executing the undertaking does not ordinarily do so with the assent of the other party, but against his wishes; and does not deliver it to the other party, but files it with the court or clerk. The promise or undertaking does not *ex vi termini* import a consideration, but when given in pursuance of a statute, and to effect the object allowed by that statute, is upheld by the statute, and has its consideration in the attainment of the object for which it was given.<sup>1</sup> It has been said that no consideration is necessary to support a statutory undertaking; and certainly no consideration need be stated in the instrument or proved upon the trial of an action brought to enforce it.<sup>2</sup>

But as every undertaking given in a judicial proceeding, not under seal, and expressing no consideration, depends for its consideration to uphold it upon what it gets from being made in pursuance of a statute authorizing it, or from what may be shown *aliunde* to exist, it follows that such parts of an undertaking as are not required nor authorized by any statute, nor based upon any order of the court or agreement of the parties, are without consideration and void.<sup>3</sup>

A recognizance, on the other hand, is an obligation of record and imports a consideration, and may be a valid instrument at common law, although given in a case where no recognizance was required.<sup>4</sup>

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<sup>1</sup> Thompson v. Blanchard, 3 N. Y. 335.

<sup>2</sup> Bildersee v. Aden, 62 Barb. 175.

<sup>3</sup> Post v. Doremus, 60 N. Y. 371.

<sup>4</sup> Johnson v. Laserre, 2 Ld. Raym. 1459; Mitchell v. Thorp, 5 Wend. 287.



## CHAPTER V.

### REQUIREMENTS OF THE STATUTE OF FRAUDS.

- Section 1.—The contract must be in writing.
- 2.—What contracts are within the statute; general principles.
  - 3.—Promise to pay promisor's own debt.
  - 4.—Where the promisor holds property charged with the payment of the debt.
  - 5.—Where there was some prior liability of the promisor or his property.
  - 6.—Promises to indemnify and save harmless.
  - 7.—Promises accepted in lieu of the original debt.
  - 8.—On the sale and transfer of the evidence of debt.
  - 9.—Promises made on the purchase of property.
  - 10.—Promises made to the debtor or person interested for him.
  - 11.—Promises to pay for goods delivered or services rendered to third persons.
  - 12.—Promises in consideration of forbearance.
  - 13.—Promises prior to the original debt.
  - 14.—Effect of the consideration moving or not moving to the promisor.
  - 15.—Statutory undertakings.
  - 16.—Expressing consideration.
  - 17.—Sufficiency of the statement of consideration.
  - 18.—Signature to the contract.
  - 19.—What is a sufficient note or memorandum.

#### SECTION 1.—*The contract must be in writing.*

For the prevention of frauds and perjuries arising out of the temptation to charge upon a solvent person a promise to be answerable for the default of one who, after obtaining credit has been found irresponsible, the English law makers, at an early day, enacted the statute commonly known as the Statute of Frauds, by which it was, among other things, provided that no action shall be brought whereby to charge any executor or administrator upon any special promise to answer, damages out of his own estate, or whereby to charge the defendant

upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized.<sup>1</sup>

In Georgia, Maryland, and South Carolina the English Statute of Frauds is in force; and in most of the other States the same statute has been re-enacted with few variations or additions.<sup>2</sup>

The statute of Delaware differs in some material particulars from the English statute.<sup>3</sup> The Michigan, New York, Nevada and Wisconsin statutes declare all contracts to answer for the debt, default or miscarriage of any other person, absolutely void unless in writing and subscribed by the party to be charged or his agent; while the statute of Iowa makes parol evidence of such contracts incompetent.<sup>4</sup> It will be seen, also, by reference

<sup>1</sup> Statute, 29 Car. 2, cap. 3.

<sup>2</sup> For the Statute of Frauds of the several States, see the following: Alabama, Code, 1852, sec. 1551; Arkansas, Eng. Dig. ch. 73, sec. 1; California, Laws of 1850, ch. 47, sec. 12; Connecticut, Rev. Stat. 1849, tit. 19, sec. 1; Florida, Thomp. Dig. 1847, tit. 4, ch. 3, sec. 1; Illinois, Rev. Stat. 1845, ch. 44, sec. 1; Indiana, Rev. Stat. 1852, ch. 42, sec. 1; Kansas, Comp. Laws, of 1862, ch. 102, sec. 5; Kentucky, Rev. Stat. 1852, ch. 22, sec. 1; Maine, Rev. Stat. 1840, ch. 136, sec. 1; Massachusetts, Gen. Stat. 1860, part 2, tit. 6, ch. 105; Michigan, Rev. Stat. 1846, tit. 19, ch. 81, sec. 1; Minnesota, Rev. Stat. 1866, ch. 41, tit. 2, sec. 6; Mississippi, Hutch. Code, ch. 4, art. 1, sec. 1; Missouri, Rev. Stat. 1845, ch. 68, sec. 5; Nevada, Laws of 1861, ch. 9, sec. 61; New Hampshire, Rev. Stat. 1842, ch. 180, sec. 8; New Jersey, Rev. Stat. 1847, tit. 17, ch. 1, sec. 14; New York, 3 Rev. Stat. (6th ed.) p. 142, sec. 2; North Carolina, 1 Rev. Stat. ch. 50, sec. 10; Oregon, Civil Code. tit. 8, ch. 8, sec. 775; Ohio, Rev. Stat. (Swan's ed.) ch. 49, sec. 5; Pennsylvania, Dunlap's Laws, ch. 59; Laws of 1855 (Pamph. Laws), 308; Rhode Island, Rev. Stat. 1844, p. 222; Tennessee, 1 Scott's edition of Laws, ch. 25, sec. 1; Texas, Act of January 18th, 1840; Vermont, Rev. Stat. 1839, tit. 15, ch. 61, sec. 1; Virginia, Part. & Rob. Code, 1849, ch. 143, sec. 1; Wisconsin, Rev. Stat. 1849, tit. 20, ch. 76, sec. 2.

<sup>3</sup> Rev. Code, 1852, ch. 63, sec. 6.

<sup>4</sup> Code of 1851, secs. 2409, 2410.

to the statutes cited, that the provision in the English statute in reference to executors and administrators has not been incorporated in the statutes of California, Minnesota, Nevada, New York or Wisconsin.

By a subsequent English statute it is provided that no action shall be brought whereby to charge any person upon, or by reason of, any representation or assurance made or given, concerning or relating to the character, conduct, credit, ability, trade or dealings of any other person, to the intent or purpose that such other person may obtain credit, money or goods, unless such representation or assurance be made in writing, signed by the party to be charged therewith.<sup>1</sup>

This statute has been substantially re-enacted in Alabama, Indiana, Maine, Massachusetts, Michigan, Oregon, Vermont and Virginia.

## SECTION 2.—*What contracts are within the statute. General principles.*

The New York Statute of Frauds declares every special promise to answer for the debt, default, or mis-carriage of another person, void, unless such agreement, or some note or memorandum thereof be in writing and subscribed by the party to be charged therewith.<sup>2</sup> The

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<sup>1</sup> Statute 9 George IV, cap. 14. In some cases a distinction has been attempted to be made in respect to legal effect, between statutes declaring that no unwritten contract "shall be valid" and statutes declaring that "no action shall be maintained" on such contracts, the position taken being that the former statutes render the contract void, while the latter render it voidable, or not enforceable by suit at law. The distinction is now regarded by authors generally, and in most of the decided cases, as without any essential difference, as the statutes owe their origin to the same policy, and all aim at the same object. *Bird v. Munroe*, 66 Me. 337; S. C. 22 Am. R. 571, 577. See *Townsend v. Hargraves*, 118 Mass. 325; *Brown on Stat. Frauds*, §§ 115, 136; *Benjamin on Sales*, § 114.

<sup>2</sup> 3 Rev. Stat. (6th ed.) 142, sec. 2.

language of the statute is perfectly plain, and to one inexperienced it would not appear that any great number of difficult cases could arise depending upon its construction; but an examination of the cases shows that there have been but few more prolific sources of litigation. The language shows that the test to be applied to every case is, whether the party sought to be charged is the principal debtor, primarily liable, or whether he is only liable in case of the default of a third person; in other words, whether he is the debtor, or whether his relation to the creditor is that of a surety to him for the payment or performance, by some other person, of the obligation of the latter to the creditor. In the former case the promise is not within the statute, because the party promising is not undertaking for the performance by another of some duty owing by the other, but for the performance of his own obligation; but in the latter case it is within the statute, because the liability is contingent upon whether another performs his obligation for whose performance the party sought to be charged has undertaken. There has never been any dispute as to the above principles, but the difficulty has been in determining to which class the case under consideration belongs.<sup>1</sup>

It will be found from an examination of the cases that the question whether the promise was "original" or "collateral" has been a test frequently adopted in determining whether the promise comes within the statute of frauds or otherwise. The words "original" and "collateral" are not in the statute, but were used at an early day in their true sense, the one to mark the obligation of the principal debtor; and the other that of the person who undertook to answer for such debt. This would be a

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<sup>1</sup> *Brown v. Weber*, 38 N. Y. 187; *Booth v. Eighmie*, 60 N. Y. 238; *Saunders v. Gillespie*, 59 N. Y. 250.

perfect test if the term "original" is understood in all cases as applicable only to an absolute undertaking by the party promising to discharge an obligation of his own, not at all dependent upon performance or non-performance of any thing by another. But it has sometimes happened that, by losing sight of the exact ideas represented by these terms, the word "original" has been used to characterize any new promise to pay an antecedent debt of another person. Such promises have been called original, because they are new ; and then, as original undertakings are agreed not to be within the statute of frauds, so these new promises, it is often argued, are not within it ; and it is here that much confusion has arisen among the reported cases.<sup>1</sup>

In a leading case in New York,<sup>2</sup> Chief Justice Kent divided the cases on this branch of the statute of frauds into three classes, as follows: First, cases in which the promise is collateral to the principal contract, but is made at the same time and becomes an essential ground of the original credit ; Second, cases in which the collateral undertaking is subsequent to the creation of the debt, and was not the inducement to it, though the subsisting liability is the ground of the promise ; Third, cases in which the promise to pay the debt of another arises out of some new and original consideration of benefit or harm, moving between the newly contracting parties.

In the second class of cases there must be some further or new consideration shown, as the consideration of the original debt will not attach to the subsequent promise.

The first two classes are within the statute of frauds, but the latter is not.

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<sup>1</sup> *Brown v. Weber*, 38 N. Y. 187 ; *Mallory v. Gillett*, 21 N. Y. 412.

<sup>2</sup> *Leonard v. Vreedenburgh*, 8 Johns. 29.

This classification of the cases has been a landmark of the law in the State of New York for more than half a century. But the value of the classification has too often been impaired by a failure to note the true distinction between the second and third classes of cases. In both the latter cases there is a promise, in form at least, to pay the antecedent debt of a third person, and in that respect they are alike. The distinction is in the consideration of the promises which belong to the two classes of cases; not in respect to the particular nature or kind, but in respect to the parties between whom it moves. In the second class the new or further consideration moves to the primary debtor, and may consist of a forbearance to sue him, or a release to him of some security, or of any sufficient benefit to him or of harm to the creditor, but in which the collateral promisor has no interest or concern. In the third class, the consideration, whatever its nature, moves to the person making the promise, and may consist of benefit to him or harm to the party with whom he is dealing as in all other cases of contract.<sup>1</sup>

The doctrine of the case of *Leonard v. Vreedenburgh*, has not escaped criticism, and has, in some cases, been expressly repudiated. It has been held that it is not true, as a general rule, that a promise to pay the debt of another is not within the statute if it rests upon a new consideration passing from the promisee to the promisor; that a new consideration for a new promise is indispensable without the statute; and if a new consideration is all that is needed to give validity to the promise to pay the debt of another the statute amounts to nothing; that the consideration for the promise is of importance only where it is either a substantial transfer of the creditor's claim to the promisor, making the transaction a purchase,

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<sup>1</sup> *Mallory v. Gillett*, 21 N. Y. 412; and see *Nelson v. Boynton*, 3 Metc. 396.

or where it is a transfer to the promisor of a fund pledged, set apart, or held, for the payment of the debt; and that it can make no difference that the consideration moves from the promisee to the promisor.<sup>1</sup> And in New York it is held that the receipt or non-receipt of a consideration by the party promising does not in every case determine whether the promise is within the statute or not.<sup>2</sup> It is clearly impossible to harmonize all the decisions in which the question as to what contracts the statute applies has been considered. But there are some general tests which the courts have adopted in determining the question which may best be considered separately.

### SECTION 3.—*Promise to pay promisor's own debt.*

The statute of frauds applies to promises to pay the debt of another, and to no other; and, therefore, where the promise is in fact to pay the promisor's own debt in a particular way, though in form it is a promise to pay the debt of another, the statute does not apply.<sup>3</sup>

The illustrations of this doctrine are to be found in all the reports. The question is simply whose debt is promised to be paid, and not what is the form of the con-

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<sup>1</sup> *Maule v. Buckwell*, 14 Wright, 39; *Townsend v. Long*, 77 Penn. St. 143; s. c. 18 Am. R. 438.

<sup>2</sup> *Brown v. Webber*, 38 N. Y. 187.

<sup>3</sup> *Putnam v. Farnham*, 27 Wis. 187; s. c. 9 Am. R. 459; *Johnson v. Gilbert*, 4 Hill, 178; *Brown v. Curtis*, 2 N. Y. 225; *Garner v. Hudgins*, 46 Mo. 399; s. c. 2 Am. R. 520; *Calkins v. Chandler*, 36 Mich. 320; s. c. 24 Am. R. 593; *Malone v. Keener*, 8 Wright, 107; *Uhler v. Farmer's Nat. Bank*, 14 P. F. Smith, 406; *Whitcomb v. Kephart*, 14 Wright, 85; *Rollison v. Hope*, 18 Tex. 446; *Barringer v. Warden*, 12 Cal. 311; *McCready v. Van Hook*, 35 Tex. 631; *Wilson v. Bevans*, 58 Ill. 233; *Besshears v. Rowe*, 46 Mo. 501; *Clymer v. De Young*, 54 Penn. 118; *Jennings v. Crider*, 2 Bush (Ky.), 322; *Alcalda v. Morales*, 3 Nev. 132; *Berry v. Doremus*, 1 Vroom (N. J.), 399; *Dyer v. Gibson*, 16 Wis. 557; *Dearborn v. Parks*, 5 Greenl. 81; *Cotterill v. Stevens*, 10 Wis. 422; *Schindler v. Euell*, 45 How. 33; *Seaman v. Hasbrouck*, 35 Barb. 151.

tract. If it is the promisor's own debt which he has agreed to pay, the promise need not be in writing.

If a landowner who has engaged to make certain advances to a cropper upon his land, promises a third person that if he will make the advances, he, the landowner, will be responsible for them; the promise need not be in writing as it is not within the statute.<sup>1</sup>

SECTION 4.—*Where the promisor holds property charged with the payment of the debt.*

Where a person holds property charged with the payment of a debt to another, he is liable on a promise made to the creditor to pay the debt whether the promise is in writing or not.<sup>2</sup> This is the rule in all cases where there has been some transfer to the promisor of a fund or security charged with the payment of the debt.<sup>3</sup> For example, a parol agreement by a grantee to pay a mortgage on the premises conveyed to him is valid.<sup>4</sup> So, if a person purchases premises which were subject to a mortgage given by his grantor, the payment of which he has not assumed, and, subsequently, orally agrees with the owner of the mortgage that, if he will postpone the foreclosure of the mortgage and extend the time for the payment of the interest then due, that he will when the next installment becomes due pay both, the contract is binding, and the creditor may maintain an action against the grantee on his non-performance.<sup>5</sup> The grantee by virtue

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<sup>1</sup> Neal v. Bellamy, 73 N. C. 384.

<sup>2</sup> Townsend v. Long, 77 Penn. St. 143; S. C. 18 Am. R. 438; Huyler v. Atwood, 26 N. J. Eq. 504.

<sup>3</sup> Hearing v. Dittman, 8 Phill. (Pa.) 307; Fullam v. Adams, 37 Vt. 391; Merrill v. Englesby, 28 Vt. 150; Wait v. Wait, 28 Vt. 350; Hilton v. Dinsmore, 8 Shp. 410.

<sup>4</sup> Huyler v. Atwood, 26 N. J. Eq. 504; Ruhling v. Hackett, 1 Nev. 360.

<sup>5</sup> Prime v. Koehler, 77 N. Y. 91.



of his agreement takes the rents and profits of the mortgaged premises during the forbearance, and the forbearance itself is a good consideration for the promise to pay the interest then due from the grantee to the mortgagee,<sup>1</sup> and this consideration runs directly from the promisor to the promisee. Two important principles, which seem to have been engrafted by the courts as exceptions to the statute of frauds, apply to such cases. Where the promise to pay the debt of another arises out of some new and original consideration of benefit to the promisor, or harm to the promisee, moving to the promisor from the promisee, or, as it is frequently stated, when the promise arises out of some new and original consideration of benefit or harm between the newly contracting parties, the statute does not apply.<sup>2</sup> The subsisting liability of the original debtor is no objection to a recovery on the parol promise, where the purpose of the promise is to obtain a benefit to the promisor by relieving his property from a lien, and securing and confirming his possession.<sup>3</sup>

An oral promise by a mortgagee of chattels to pay a mechanic for repairs thereon if he will relinquish his lien for repairs is not within the statute.<sup>4</sup> But this would not be the rule if the promisor had no interest in the chattel so that no new consideration moved to him.<sup>5</sup>

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<sup>1</sup> See *ante*, ch. iv, § 6.

<sup>2</sup> *Prime v. Koehler*, 77 N. Y. 91; *Johnson v. Knapp*, 36 Iowa, 616; *Wyman v. Goodrich*, 26 Wis. 21; *Barker v. Bradley*, 42 N. Y. 316; S. C. 1 Am. R. 521; *Britton v. Angier*, 48 N. H. 420; *Brown v. Brown*, 47 Mo. 130; *Goetz v. Foos*, 14 Minn. 265; *Eastwood v. Kenyon*, 11 Adol. & Ell. 438; *Green v. Brookins*, 23 Mich. 48; S. C. 9 Am. R. 74; *Farley v. Cleveland*, 4 Cow. 423; S. C. 9 Cow. 639; *Sanders v. Gillespie*, 59 N. Y. 250; *Leonard v. Vreedenburgh*, 8 Johns. 39.

<sup>3</sup> *Prime v. Koehler*, 77 N. Y. 91; *Calkins v. Chandler*, 36 Mich. 320; S. C. 24 Am. R. 593. *Farley v. Cleveland*, 4 Cow. 432; S. C. 9 Cow. 639; *Mallory v. Gillett*, 21 N. Y. 412.

<sup>4</sup> *Couradt v. Sullivan*, 45 Ind. 180; see also *Carothers v. Connolly*, 1 Mont. T. 433.

<sup>5</sup> *Mallory v. Gillett*, 21 N. Y. 412. See *Booth v. Eighmie*, 60 N. Y. 238.

The mere fact that the person promising to pay the debt of another, had, in his own hands at the time of the promise, sufficient property of the debtor to pay the debt, does not take the case out of the statute of frauds.<sup>1</sup> To have this effect the party making the promise must hold the funds of the debtor for the purpose of paying his debts, and as between him and his debtor it must be his *duty* to pay the debts, so that when he promises the creditor to pay it, in substance his promise is to pay his own debt and not that of another.<sup>2</sup>

SECTION 5.—*Where there was some prior liability of the promisor or his property.*

Where a person makes a promise to pay the debt of another for the purpose of obtaining the release of the person or property of the debtor, or other forbearance or benefit to him, the promise is within the statute of frauds.<sup>3</sup> But where the party promising has for his object a benefit which he did not before enjoy, accruing immediately to himself, as a release of some prior liability of his own, or of his property, for the payment of the debt, the statute does not apply.<sup>4</sup> The cases illustrating the above principles are numerous. If a person promises to pay the debt of another, if not paid by himself, and the creditor is thereby induced to suffer the debtor to leave the State, taking his property with him, the case falls within the statute.<sup>5</sup> So a promise by the payee and holder of a note, made to the maker, that if the maker will forbear

<sup>1</sup> *Murphy v. Renkert*, 12 Hiesk. (Tenn.) 397.

<sup>2</sup> See opinion of Poland, Ch. J., in *Fullam v. Harris*, 37 Vt. 391. See also *Belknap v. Bender*, 75 N. Y. 446.

<sup>3</sup> *Nelson v. Boynton*, 3 Metc. 396, 402; *Krutz v. Stewart*, 54 Ind. 178.

<sup>4</sup> *Nelson v. Boynton*, 3 Metc. 396, 402; *Calkins v. Chandler*, 36 Mich. 320, S. C. 24 Am. R. 593.

<sup>5</sup> *Gillfillan v. Snow*, 51 Ind. 305.

issuing execution on a judgment he holds against a third person, he, the payee of the note, will pay the judgment by allowing the amount as a credit on the note, is within the statute and void if not in writing.<sup>1</sup>

But if the mortgagee of chattels promises to pay a mechanic for repairs made on the chattels under the employment of the mortgagor, and in consideration of the promise the mechanic relinquishes his lien for repairs, the promise is binding whether in writing or by parol.<sup>2</sup> A promise by one having a claim against a piece of property to pay the lien of another against the same piece of property is not within the statute.<sup>3</sup>

The contract of a person legally liable upon a transaction before signing the guaranty is not a guaranty of the debt of another, but of his own debt, and does not come within the statute.<sup>4</sup>

A person who abandons a lien on property to another who has an interest in the same property on the oral promise of the latter to pay the debt, may enforce the promise notwithstanding the statute of frauds.<sup>5</sup> But a promise by the mortgagee of part of a vessel, made to persons who had furnished her with supplies for which they had no lien, that he would pay their claim if they would not attach the interest of the other part owners, is within the statute.<sup>6</sup>

#### SECTION 6.—*Promises to indemnify and save harmless.*

The principles stated in the last section have been applied to promises of indemnity. It is said to be well

<sup>1</sup> Krutz v. Stewart, 54 Ind. 178.

<sup>2</sup> Berkshire v. Young, 45 Ind. 461.

<sup>3</sup> Carothers v. Connolly, 1 Mont. T. 433.

<sup>4</sup> Ellenwood v. Fuhs, 63 Barb. 321.

<sup>5</sup> Luam v. Malone, 34 Ind. 444.

<sup>6</sup> Ames v. Foster, 106 Mass. 400.

settled law that if a person signs an obligation as surety upon a promise of indemnity by one not bound by the same instrument, the promise is within the statute as being a promise to answer for the default of the principal upon his implied liability to his surety;<sup>1</sup> and that it is equally well settled that if a surety on an obligation upon his promise of indemnity, procures another to go surety with him on the same instrument, the promise is not within the statute,<sup>2</sup> for the indemnity promised is to secure his own default.

On a review of the authorities it has been stated, in accordance with the distinction above made, that "a promise by a stranger to the debt to indemnify a surety is *prima facie* within the statute, because the principal is bound by an implied obligation to do that which the promisor agrees to do expressly, and the promise is therefore really to answer for the default of the principal. When, however, the promisor is directly or indirectly answerable for the debt independently of the promise, every engagement which he may make, that it shall be paid, or that the surety shall not be compelled to pay it, will be regarded as contracted on his own behalf, and not for the debt or default of another in the same sense in which the term is used in the statute."<sup>3</sup>

In some of the States the doctrine above stated has not been adopted in its full extent, and the promise of a person, already bound as a surety in an instrument, made to a stranger thereto, that if he will also sign the instrument as surety the promisor will save him harmless from

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<sup>1</sup> Ferrell v. Maxwell, 28 Ohio St. 383; S. C. 22 Am. R. 393; Easter v. White, 12 Ohio St. 219; Kelsey v. Hibbs, 13 Ohio St. 340.

<sup>2</sup> Ferrell v. Maxwell, 28 Ohio St. 383; S. C. 22 Am. R. 393; Oldham v. Broome, 28 Ohio St. 41; Horn v. Bray, 51 Ind. 555; S. C. 19 Am. R. 742; Barry v. Ransom, 12 N. Y. 462; Mallory v. Gillett, 21 N. Y. 412; Konitzky v. Meyer, 49 N. Y. 571.

<sup>3</sup> Smith's Lead. Cas. (7 Am. Ed.) 511.

all damages therefrom, has been held to come within the statute and to be void if not in writing.<sup>1</sup>

In other States the contrary doctrine has been adopted, and contracts to indemnify a surety have been held original promises and not within the statute.<sup>2</sup>

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<sup>1</sup> *Bissig v. Britton*, 59 Mo. 204; s. c. 21 Am. R. 379; *Brown v. Adams*, 1 Stew. 51; *Draughan v. Bunting*, 9 Ired. 10; *Simpson v. Nance*, 1 Spears, 4; *First National Bank v. Bennett*, 33 Mich. 520; *Kingsley v. Balcome*, 4 Barb. 131; *Martin v. Black's Ex.*, 20 Ala. 309.

<sup>2</sup> Among the States in which it has been held that a promise of indemnity is an original undertaking and not within the statute of frauds, are Massachusetts, Pennsylvania, Iowa, Maine, New Hampshire, Vermont, Maryland, Georgia, Kentucky, Missouri, and New Jersey. See *Taylor v. Savage*, 12 Mass. 98; *Aldrich v. Ames*, 9 Gray, 76; *Harris v. Brooks*, 21 Pick. 195; *Chapin v. Lapham*, 20 Pick. 469; *Blake v. Cole*, 22 Pick. 97; *Hendrick v. Whittemore*, 105 Mass. 23; *Smith v. Sayward*, 5 Greenl. 504; *Holmes v. Knights*, 10 N. H. 175; *Cutter v. Emery*, 37 N. H. 562; *Whitehouse v. Hanson*, 42 N. H. 9; *Hodges v. Hall*, 29 Vt. 209; *Keith v. Goodwin*, 31 Vt. 268; *Adams v. Flanagan*, 36 Vt. 400; *Byers v. McClanahan*, 6 Gill. & J. 250; *Jones v. Shorter*, 1 Kelly, 294; *Dunn v. West*, 5 B. Mon. 376; *Lucas v. Chamberlain*, 8 B. Mon. 276; *Jones v. Letcher*, 13 B. Mon. 363; *Melms v. Werdehoff*, 14 Wis. 18; *Apgar's Adm'rs v. Hiler*, 4 Zab. 812; *March v. Consolidation Bank*, 48 Penn. St. 510; *Kelly v. Gillespie*, 12 Iowa, 55. In New York and some of the other States, the decisions are not harmonious. See *Chapin v. Merrill*, 4 Wend. 657; *Kingsley v. Balcome*, 4 Barb. 131; *Barry v. Ransom*, 12 N. Y. 462. The conflict in authorities has arisen in many cases from an attempt to follow the English decisions. The earliest English case bearing upon this question is that of *Winkworth v. Mills* (2 Esp. N. P. 484), decided at *nisi prius*, in which it was held that where a person signed a note at the request of another upon a promise of indemnity, the promise is within the statute, as it is an agreement to answer for the debt and default of another. The next case is that of *Thomas v. Cook* (8 B. & C. 728), in which it was held that a promise of indemnity is an original contract between the parties, and hence is not within the statute. But in the subsequent case of *Green v. Cresswell* (10 A. & E. 453,) decided in the same court, *Thomas v. Cook* was overruled and the opposite doctrine announced; and now, for some time past, the English judges have been casting doubts upon the correctness of the decision in *Green v. Cresswell*. See *Batson v. King*, 4 H. & N. 739; *Cripps v. Hartnoll*, 4 Best & S. 414.

SECTION 7.—*Promises accepted in lieu of the original debt.*

A promise in form to pay or answer for the debt of another, which is accepted by the promisee in lieu of his claim against the original debtor, so that the debt of the latter is extinguished, is not within the statute of frauds.<sup>1</sup>

In many cases the test whether a promise is or is not within the statute of frauds, is to be found in the fact that the debtor does or does not remain liable on his undertaking; if he is discharged by a new arrangement made on sufficient consideration with a third party, this third party may be held on his promise, though not in writing; but if the original debtor remains liable, and the promise of the third party is only collateral to his, it will in strictness be nothing more than a promise to answer for the other's debt.<sup>2</sup> But where the third party is himself to receive the benefit for which his promise is exchanged, it is not usually material whether the original debtor remains liable or not.<sup>3</sup> This is an exception to the general rule.<sup>4</sup> The general rule is that as long as the debt of the person for whom the promise is made, remains, the promise is collateral.<sup>5</sup> If the person in whose

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<sup>1</sup> Wood v. Corcoran, 1 Allen, 405; Warren v. Smith, 24 Texas, 484; Andre v. Bodman, 13 Md. 241; Harris v. Young, 40 Ga. 65; Packer v. Benton, 35 Conn. 343; Yale v. Edgerton, 14 Minn. 194; Wallace v. Freeman, 25 Texas, 91; Day v. Cloe, 4 Bush (Ky.), 563; Arnold v. Stedman, 9 Wright, 186; Anstey v. Marden, 4 Bos. & Pul. 124; Mallory v. Gillett, 21 N. Y. 412; Britannia Co. v. Zingsen, 48 N. Y. 247; S. C. 8 Am. R. 549; Watson v. Jacobs, 29 Vt. 169; Anderson v. Davis, 9 Vt. 136.

<sup>2</sup> Calkins v. Chandler, 36 Mich. 320; S. C. 24 Am. R. 593; Jones v. Walker, 13 B. Mon. 357; Waggoner v. Gray, 2 Hen. & Mumf. 603; Ware v. Stephenson, 10 Leigh, 155; Noyes v. Humphries, 11 Gratt. 643.

<sup>3</sup> Calkins v. Chandler, 36 Mich. 320; S. C. 24 Am. R. 593; Farley v. Cleveland, 4 Cow. 432; S. C. 9 Cow. 639; Mallory v. Gillett, 21 N. Y. 412.

<sup>4</sup> For the cases sustaining the exception, see section 4 of this chapter.

<sup>5</sup> Stewart v. Campbell, 58 Me. 439; S. C. 4 Am. R. 296.

behalf the promise is made is not discharged, but the person promising agrees to see the debt paid, so that the promisee has a double remedy, the promise is collateral, and must be in writing.<sup>1</sup>

It is undoubtedly a general rule that debts cannot be assigned. But if a debtor, creditor and a third party meet and agree that the third party shall be substituted for the debtor, the debtor is exonerated, and the creditor can recover against the third party, so far establishing an exception to the rule that debts cannot be assigned.<sup>2</sup> There is a species of novation, called delegation in the civil law, which is effected by intervention of another person, whom the debtor, in order to be liberated from his creditor, gives to such creditor, or to some person whom the creditor appoints, and this third person becomes liable to the creditor in the place of the original debtor. But to bring this about it is necessary that there should be a concurrence of the original debtor and the person whom he appoints; and, at common law, there must be the mutual assent of all parties to make the substitution effectual.<sup>3</sup> If A. owes B. a sum of money, and B. owes C. the same sum, and they meet and it is agreed between them that A. shall pay C. that sum, B.'s debt is extinguished, and C. may recover the amount of the debt on the promise of A. to pay it. Such promises are not within the statute.<sup>4</sup>

Where the debt has been absolutely purchased by the promisor, the statute does not apply.<sup>5</sup>

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<sup>1</sup> *Waggoner v. Gray*, 2 Hen. & Mumf. 603; *Noyes v. Humphries*, 11 Gratt. 643.

<sup>2</sup> *Bird v. Gammon*, 3 Bing. (N. C.) 883; *Tatlock v. Harris*, 3 D. & E. 180; *Fairlee v. Denton*, 8 B. & C. 395.

<sup>3</sup> *Butterfield v. Hartshorn*, 8 N. H. 348.

<sup>4</sup> *Stewart v. Campbell*, 58 Me. 439; S. C. 4 Am. R. 296; *Harris v. Young*, 40 Ga. 65.

<sup>5</sup> *Hearing v. Dittman*, 8 Phil. (Pa.) 307; *Hardy v. Blazer*, 29 Ind. 226.

SECTION 8.—*On the sale and transfer of the evidence of debt.*

When the owner of a promissory note as part of the terms of its sale, guarantees its payment, his contract is not within the statute of frauds for the reason that the promise is made upon a new and original consideration moving between the creditor and the promisor in an important dealing between them.<sup>1</sup> Where a party on procuring a loan, delivers in payment of the loan the note of a third person, at the same time promising that the note is good and will be paid at maturity, the promise is not within the statute. The promise may be regarded in effect not as a collateral promise to answer for the default of the maker of the note, but as a promise to pay to the vendee the money loaned in case the maker of the note does not pay him.<sup>2</sup>

SECTION 9.—*Promises made on the purchase of property.*

A promise, in form, at least, to answer for the debt of another, is not within the statute of frauds when, upon the whole transaction, the fair inference is that the leading object or purpose and effect of the transaction was the purchase or acquisition by the promisor from the promisee of some property lien or other benefit which he did not before possess but which inured to him by reason

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<sup>1</sup> Wymen v. Goodrich, 26 Wis. 21; Milk v. Rich, 15 Hun, 178; Johnson v. Gilbert, 4 Hill, 178; Cardell v. McNiel, 21 N. Y. 336; Bruce v. Burr, 67 N. Y. 237. So, where a corporation has guaranteed the obligations of another corporation, and after becoming the owner of the obligations has transferred them with the guaranties indorsed thereon to a purchaser for value, the purchaser may recover in an action on the guaranty, although the guaranty was not made at the time of the transfer, and the true consideration was not expressed therein. Arnot v. Erie Railway Co. 67 N. Y. 315.

<sup>2</sup> Milk v. Rich (N. Y. Ct. App.), not reported.



of his promise, so that the debt for which he is liable may fairly be deemed a debt of his own contracted in such purchase or acquisition.<sup>1</sup>

SECTION 10.—*Promises made to the debtor or person interested for him.*

The provision in the statute of frauds, that no action shall be brought to charge any person upon a promise to answer for the debt of another, unless such promise is in writing, applies only to promises made to the creditor. A person may make a valid parol contract with the debtor to pay his debt, or with any person other than the creditor, notwithstanding the statute of frauds.<sup>2</sup>

An agreement made with the debtor, or some person interested for him, to pay and discharge the debt, if founded upon a new and valid consideration, is an independent undertaking, and does not come within the letter or spirit of the statute.<sup>3</sup>

SECTION 11.—*Promises to pay for goods delivered or services rendered to third persons.*

It frequently happens that the courts are called upon to pass upon the validity of oral promises made in behalf of some person of doubtful solvency, on the strength of

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<sup>1</sup> Ames v. Foster, 106 Mass. 400; S. C. 8 Am. R. 343; Alger v. Scovill, 1 Gray, 391; Nelson v. Boynton, 3 Metc. 396; Fisher v. Thomas, 5 Gray, 45; Burr v. Wilcox, 13 Allen, 269; Furbish v. Goodnow, 98 Mass. 296; Clay v. Walton, 9 Cal. 328.

<sup>2</sup> Brown v. Brown, 47 Mo. 130; Center v. McQuesten, 18 Kansas, 476. A mortgagor may maintain an action on an oral promise of the vendee of the mortgaged premises to pay the mortgage as part of the purchase money. Ruhling v. Hackett, 1 Nev. 560.

<sup>3</sup> Britton v. Angier, 48 N. H. 420; Brown v. Brown, 47 Mo. 130; Barker v. Bradley, 42 N. Y. 316; S. C. 1 Am. R. 521; Price v. Truesdell, 28 N. J. Eq. 200.

which credit has been given, and goods have been delivered to the third person, who has afterwards made default in payment. In determining whether such promises are within the statute of frauds, the true test is, was any credit, whatever, given to the person receiving the property, and if there was, then the promisor is not liable.<sup>1</sup> If it appears that the credit was given to the principal and surety jointly, or that the surety was not to be liable unless in case of the default of the principal, the promise is within the statute and must be in writing.<sup>2</sup> But where the promise is to pay for goods delivered to a third person on the sole credit of the promisor, the promise is not within the statute.<sup>3</sup> Where a contractor agreed to build a court-house and furnish the material but could not procure the brick, and the county commissioners told the owner of the brick to furnish them and they would see him paid, it was held that the promise was direct and not within the statute of frauds.<sup>4</sup> So, if a person promises to pay a physician for services to be rendered in treating a third person, the undertaking is original and not a promise to answer for the debt of another.<sup>5</sup> The same principle which applies to promises to pay for goods to be delivered to a third person, applies, also, to promises to pay for services to be rendered for such person.<sup>6</sup>

An agreement by A. to pay B. for work to be done

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<sup>1</sup> *Pettit v. Braden*, 55 Ind. 201; *Cowdin v. Gottgetreu*, 55 N. Y. 650; *Bloom v. McGrath*, 53 Miss. 249; *Hetfield v. Dow*, 3 Dutch. (N. J.) 440; *Swift v. Pierce*, 13 Allen, 136; *Boykin v. Dohlond*, 1 Ala. 502; *Walker v. Richards*, 39 N. H. 259.

<sup>2</sup> *Pettit v. Braden*, 55 Ind. 201; *Searight v. Payne*, 2 Tenn. Ch. 175; *Carville v. Crane*, 5 Hill, 483; *Brown v. Bradshaw*, 1 Duer (N. Y.) 199; *Hill v. Raymond*, 3 Allen, 540; *Welch v. Marvin*, 36 Mich. 59.

<sup>3</sup> *Williams v. Corbet*, 28 Ill. 262.

<sup>4</sup> *Jefferson County v. Slagle*, 66 Penn. St. 202.

<sup>5</sup> *Eddy v. Davidson*, 42 Vt. 56.

<sup>6</sup> *Miller v. Neihaus*, 51 Ind. 401; *Backus v. Clark*, 1 Kansas, 303; *Wood v. Patch*, 11 R. I. 445.

for C., is not a promise to answer for the debt of another, and is not within the statute.<sup>1</sup> So, where work has been let by contract and the employees of the contractor refuse to continue in his employment unless the person for whom the work is done will be responsible for their pay, an oral promise to pay if the contractor does not, is not within the statute.<sup>2</sup> Here is a direct refusal to work on the credit and under the employment of the contractor. But where W. contracted with H. to build a mill, and H. after erecting the frame, contracted with B. to complete the same, and B. expressing fears to W. of the responsibility of H., was told by W. that he would see that he got his pay if he finished the mill according to contract, it was held that the promise of W. was within the statute of frauds, being contingent upon the non-fulfillment of the agreement made with B. by H.<sup>3</sup>

But, in all cases, in determining whether the transaction is a sale to the promisor, an employment by him, or a parol guaranty on his part of payment by another, the language of the promise is to be construed in the light of the acts of the parties, and the surrounding circumstances and the question is one of fact. The fact that the creditor charged the goods or wages directly to the promisor, is not conclusive on the latter.<sup>4</sup>

#### SECTION 12.—*Promise in consideration of forbearance.*

An agreement to forbear to sue a debtor is a good consideration for a promise by a third person to pay the

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<sup>1</sup> Sinclair v. Bradley, 52 Mo. 180; Brown v. George, 17 N. H. 128; Eddy v. Davidson, 42 Vt. 56.

<sup>2</sup> Hiltz v. Scully, 1 Cinc. (Ohio) 555; Warnick v. Grosholz, 3 Grant (Penn.) 234.

<sup>3</sup> Brown v. Weber, 38 N. Y. 187; see, also, Brester v. Pendall, 12 Mich. 224; Devlin v. Woodgate, 34 Barb. 252; Clay v. Walton, 9 Cal. 328.

<sup>4</sup> Cowdin v. Gottgetu, 55 N. Y. 650.

debt, and if the agreement is in writing, it can, in all cases, be enforced.<sup>1</sup> But while the debt remains a subsisting demand against the original debtor, the promise of a third person is collateral, and must be in writing.<sup>2</sup>

But there is an exception to this rule, when the debtor, at the time the promise is made, places funds in the hands of the promisor with which to pay the debt.<sup>3</sup> The promise, in such case, is not founded on the forbearance alone,<sup>4</sup> and the promise will be taken out of the general rule requiring the promise to be in writing, if in addition to the agreement for forbearance, there is some other new and original consideration of benefit or harm moving between the newly contracting parties.<sup>5</sup> "It is not a sufficient ground to prevent the operation of the statute of frauds, that the promisee has relinquished an advantage or given up a lien, in consequence of the promise, if that advantage has not also directly inured to the benefit of the promisor. The cases in which it has been held otherwise are those where the promisee, in consideration of the promise, has relinquished some lien, benefit, or advantage for securing or recovering his debt, and where by such relinquishment the same interest or advantage has inured to the benefit of the promisor. In such cases, although the result is that the payment of the debt of a third person is effected, it is

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<sup>1</sup> *Forth v. Stanton*, 1 Wms. Saund. 211; *Calkins v. Chandler*, 36 Mich. 320.

<sup>2</sup> *Watson v. Randall*, 20 Wend. 201; *Nelson v. Boynton*, 3 Metc. 396; *Hearing v. Dittman*, 8 Phil. (Pa.) 307; *Krutz v. Stewart*, 54 Ind. 178; *Thomas v. Delphy*, 33 Md. 373; *Duffy v. Wunsch*, 42 N. Y. 243; S. C. 1 Am. R. 514; *Waldo v. Simonson*, 18 Mich. 345; *Dexter v. Blanchard*, 11 Allen, 365; *Jones v. Walker*, 13 B. Mon. 356; *Saxton v. Landis*, 1 Har. 302; *Stewart v. Campbell*, 58 Me. 439; S. C. 4 Am. R. 296; *Waggoner v. Gray*, 2 Hen. & Mumf. 603; *Ware v. Stephenson*, 10 Leigh, 155; *Noyes v. Humphries*, 11 Gratt. 643.

<sup>3</sup> *Dearborn v. Parks*, 5 Greenl. 81; *Hilton v. Dinsmore*, 21 Me. 410.

<sup>4</sup> *Hilton v. Dinsmore*, 21 Me. 410.

<sup>5</sup> See § 4 of this chapter, and cases cited; *Calkins v. Chandler*, 36 Mich. 320.

so incidentally and indirectly, and the substance of the contract is the purchase by the promisor of the promisee of the lien, right, or benefit in question.”<sup>1</sup>

Where a third party makes an oral promise to a sheriff, that he will pay the amount of an execution if he will not sell the defendant's horse, and the sheriff is compelled to pay the debt, he may recover on the promise.<sup>2</sup>

It has been held that a promise by a stranger that, if the plaintiff will cease to prosecute an action, he will pay the debt and costs, is within the statute.<sup>3</sup> So a promise by one creditor to pay the debt of another creditor of the same debtor, in consideration of the second creditor's forbearing to attach the debtor's property, is within the statute.<sup>4</sup> So of a promise to pay the debt of another if the creditor will not enforce an alleged lien and thereby detain a vessel, in whose voyage the promisor is interested,<sup>5</sup> or will not attach the interest of the other part owners.<sup>6</sup>

But where an execution had been levied on the lands of the judgment debtor, and a third person agreed to pay the judgment, if the plaintiff would extend the time of payment, the promise was held not to be within the statute.<sup>7</sup>

A promise made by a widow to a creditor of her husband's estate, that if the latter will not file his claim against the estate, or collect it from the assets, she will pay it, has been held to be an original undertaking and not within the statute,<sup>8</sup> while, on the other hand, it has

<sup>1</sup> *Curtis v. Brown*, 5 Cush. 488, per Shaw, C. J.

<sup>2</sup> *Bohannon v. Jones*, 30 Ga. 488.

<sup>3</sup> *Hearing v. Dittman*, 8 Phil. (Penn.) 307; *Duffy v. Wunsch*, 42 N. Y. 243.

<sup>4</sup> *Waldo v. Simonson*, 18 Mich. 345.

<sup>5</sup> *Stewart v. Campbell*, 58 Me. 439; S. C. 4 Am. R. 296.

<sup>6</sup> *Ames v. Foster*, 106 Mass. 400; S. C. 8 Am. R. 343.

<sup>7</sup> *Stewart v. Hinkle*, 1 Bond, 506.

<sup>8</sup> *Crawford v. King*, 54 Ind. 6.

been held that a promise by a widow, that if a physician would not present his claim for doctoring her deceased husband, she would pay the claim, was within the statute and without consideration, although the effect of the promise was to defeat the claim of the creditor and permit the widow to receive all of her husband's estate.<sup>1</sup>

SECTION 13.—*Promises prior to the original debt.*

An oral promise, that if another person will sign a note the promisor will pay it, is not within the statute;<sup>2</sup> nor is a promise made by a guarantor before the delivery of the note.<sup>3</sup> But in determining whether a guaranty of a note is an original undertaking or a collateral promise within the statute, the true test is not whether it was so indorsed before delivery, but whether the promise of the maker and that of the guarantor were parts of one and the same original transaction. If the indorsement is subsequent to the delivery of the note, but made in pursuance of a previous agreement, on the strength of which credit has been given, the guaranty is not within the statute.<sup>4</sup>

SECTION 14.—*Effect of the consideration moving or not moving to the promisor.*

Passing by the class of undertakings mentioned in the last section, which were made or agreed to be made at the time of or prior to the creation of the debt, we come to two kinds of promises of extensive use in the dealings of the community, which, in form and effect, closely resemble each other, each being to answer for or pay a debt already due or owing from a third person, yet

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<sup>1</sup> Durant v. Allen, 48 Vt. 58; see Pratt v. Humphrey, 22 Conn. 317.

<sup>2</sup> Golden v. Pierson, 42 Ala. 370.

<sup>3</sup> Ford v. Hendricks, 34 Cal. 673.

<sup>4</sup> Howland v. Aitch, 38 Cal. 133.

wholly different in respect to the motive and consideration. In the one class the promisor has no personal interest or concern, and his undertaking is made solely upon some fresh consideration passing between the creditor and his debtor. This class is within the statute. In the other, the promise may be in the same form, and when performed may have the same effect, but is made as the incident of some new dealing in which the promisor is himself concerned, and upon a consideration passing between the creditor of the debtor and himself. This class, which may include a great variety of particular examples, is not within the statute.<sup>1</sup>

#### SECTION 15.—*Statutory undertakings.*

The statute of frauds applies only to common law agreements where the consideration is a matter of mutual arrangement between the parties, and does not apply to instruments created under and deriving their obligation from special statutes, without the acceptance or assent of the party for whose ultimate benefit they are given. The statute, by authority of which they have an existence generally, if not always, requires that they shall be in writing. But there is no other legal reason why the promise contained in them should not rest in parol. They may or may not express a consideration, notwithstanding the statute, and, if otherwise in proper form, are valid.<sup>2</sup>

#### SECTION 16.—*Expressing Consideration.*

By the English Mercantile Law Amendment Act (19 and 20 Vict.) it is provided, that no special promise

<sup>1</sup> Mallory v. Gillett, 21 N. Y. 412.

<sup>2</sup> See Thompson v. Blanchard, 3 N. Y. 335; Doolittle v. Dininny, 31 N. Y. 350; Johnson v. Ackerman, 40 How. 222; Bildersee v. Aden, 62 Barb. 175; Post v. Doremus, 60 N. Y. 371.

to be made by any person after the passage of the act, to answer for the debt, default or miscarriage of another person, being in writing, and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorized, shall be deemed invalid to support an action, suit or other proceeding to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document.

This statute is too clear to admit of any misconstruction ; and as it settles the law in that country, no citations of subsequent English authorities can be of any value in determining the requirements of the statute of frauds as to the statement of the consideration in States where no such statute exists. The statute is of value, however, as an explanation of the change in the current of English authorities since the passage of that act in 1856.

By the statutes of Alabama, California, Wisconsin, Nevada, Minnesota, and Oregon, it is made essential to the validity of every promise to answer for the debt, default or miscarriage of another, that the writing containing the promise shall express the consideration ; and by the statutes of Indiana, Kentucky, Maine, Maryland, Michigan, and Virginia, it is declared that the writing containing such promise need not express the consideration, but that the existence or non-existence of a consideration may be shown by parol.

In considering the question as to whether the statute of frauds requires that the writing containing the promise to answer for the debt, default or miscarriage of another, shall express the consideration for the promise, it is obviously unnecessary to examine the decisions of those States in which the matter has been clearly regulated by



statute ; and it only remains to consider the law in the States where statutes are either silent on the subject, or leave the question open for judicial construction.

The statute of frauds of the State of New York, as enacted in the Revised Statutes of 1830, declares every special promise to answer for the debt, default or miscarriage of another person void, unless some note or memorandum, expressing the consideration, be in writing and subscribed by the party to be charged therewith. This was also in substance the provision of the Revised Laws of 1813, and of the statute of frauds from the time of Charles II, except that by the revision of 1830, the words "expressing the consideration" were inserted. Under the statute as it existed before the revision of 1830, it had been long held that the agreement required by the . . statute to be in writing, comprehended the consideration as well as the promise, and that the omission could not be supplied by parol proof of a valid consideration not specified or in some manner indicated by the agreement in writing.<sup>1</sup>

But it was, nevertheless, held that the consideration might be inferred, implied or "spelled out" from the agreement and from the papers referred to in it, and need not be expressly stated as the consideration upon which the agreement was based.<sup>2</sup> In a comparatively early case, Chief Justice Savage says: "It was thought by the revisers and the legislature that the most proper way for the courts to find out the consideration of an agreement was not to infer or imply or spell out the consideration, but

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<sup>1</sup> *Staats v. Howlett*, 4 Denio, 560 ; *Sears v. Brink*, 3 Johns. 209 ; *Leonard v. Vreedenburgh*, 8 Johns. 29 ; *Bailey v. Freeman*, 11 Johns. 221 ; *Nelson v. Dubois*, 13 Johns. 175 ; *Rogers v. Kneeland*, 10 Wend. 219 ; *Castle v. Beardsley*, 10 Hun, 343, 345 ; *Church v. Brown*, 21 N. Y. 315, 316 ; *Wain v. Walters*, 5 East, 10 ; *Saunders v. Wakefield*, 4 B. & Ald. 595 ; *Jenkins v. Reynolds*, 6 Moore, 86.

<sup>2</sup> See *Castle v. Beardsley*, 10 Hun, 343.

after the passing of the Revised Statutes the party should express the consideration."<sup>1</sup> From that time to the year 1873 the question whether the addition of the words "expressing the consideration" had added anything to the statute, or had restricted the power and ingenuity of the courts in implying or endeavoring to spell out a consideration from the agreement, was a fruitful source of controversy in the courts, leading to contradictory rulings and decisions.<sup>2</sup>

In 1863 the legislature of the State of New York amended this portion of the statute of frauds by re-enacting its provisions, omitting the words "expressing the consideration;"<sup>3</sup> and the Superior Court of the city of New York, at general term, has held that the amendment was made with the express intention that the requirement that the consideration be expressed in every agreement should thereafter no longer be insisted on in any manner;<sup>4</sup> while the Supreme Court, at general term, has held that the intention and effect of the amendment was to restore the law on this subject to the state in which it was prior to the Revised Statutes; and that where a promise is made to answer for the debt, default or miscarriage of another person, the consideration thereof must appear either expressly or by necessary implication in the note or memorandum in writing required by the statute.<sup>5</sup>

In many of the States it is held that a written promise to pay the debt of another, signed by the party intending to be bound, is a sufficient compliance with the stat-

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<sup>1</sup> *Packer v. Willson*, 15 Wend. 343.

<sup>2</sup> *Church v. Brown*, 21 N. Y. 315; *Draper v. Snow*, 20 N. Y. 331; *Brewster v. Silence*, 8 N. Y. 207.

<sup>3</sup> Laws of 1863, ch. 464.

<sup>4</sup> *Speyers v. Lambert*, 1 Sweeny, 335; S. C. 37 How. 315.

<sup>5</sup> *Castle v. Beardsley*, 10 Hun, 343. See, also, *Clark v. Hampton*, 1 Hun, 612.

ute without any recital in the writing of the consideration;<sup>1</sup> while in other States it has been held that the consideration as well as the promise must be expressed in the writing.<sup>2</sup>

SECTION 17.—*Sufficiency of the statement of consideration.*

The words "for value received" contain a sufficient statement of the consideration of a promise to pay the debt of another to meet the requirements of the statute of frauds;<sup>3</sup> and although undertakings given in the course of judicial proceedings are generally, if not universally, held not to be within the statute,<sup>4</sup> yet were the rule otherwise, the recital therein would, in most cases, contain a sufficient expression of the consideration to satisfy the requirements of the statute.<sup>5</sup>

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<sup>1</sup> This is the rule in Massachusetts (*Packard v. Richardson*, 17 Mass. 122, 128; *Lent v. Padelford*, 10 Mass. 230), in Connecticut (*Sage v. Wilcox*, 6 Conn. 124), in Indiana (*Hiatt v. Hiatt*, 28 Ind. 53), in Mississippi (*Wren v. Pearce*, 4 Sm. & Marsh. 91), in Tennessee (*Taylor v. Ross*, 3 Yerg. 330; *Gilman v. Kibler*, 5 Humph. 19), in Alabama (*Thompson v. Hall*, 16 Ala. 204), in Ohio (*Reed v. Evans*, 17 Ohio, 128), in Florida (*Dorman v. Bigelow*, 1 Branch, 281), in South Carolina (*Fyler v. Givens*, Riley, 56; *Woodward v. Pickett*, Dudley, 30. But see *Stephens v. Winn*, 3 Brev. 17), in Virginia (*Colgin v. Henley*, 6 Leigh, 85), and New Hampshire (*Britton v. Angier*, 48 N. H. 420). As to the law in New York, see *Castle v. Beardsley*, 10 Hun, 343.

<sup>2</sup> This is the law of Pennsylvania (*Clarke v. Russel*, 3 Dall. 415; *Bixler v. Ream*, 3 Penn. St. 282), Maryland (*Wyman v. Gray*, 7 Har. & J. 409; *Elliott v. Giese*, Id. 457), and New Jersey (*Buckley v. Beardslee*, 2 South. 570; *Ashcroft v. Clark*, Id. 577; *Worde v. Scudder*, Id. 681). As to the law of Texas, see *Wallace v. Hudson*, 37 Texas, 456; *Ellett v. Britton*, 10 Texas, 208. As to the law of Georgia, see *Hargrove v. Cooke*, 15 Geo. 321; *Henderson v. Johnson*, 6 Geo. 390.

<sup>3</sup> *Woodward v. Pickett*, Dudley (S. C.), 30; *Caldwell v. M'Kain*, 2 N. & M. 555; *Mosher v. Hotchkiss*, 3 Abb. App. Dec. (N. Y.) 326.

<sup>4</sup> See § 15, *ante*. p. 83.

<sup>5</sup> *Johnson v. Noonan*, 16 Wis. 687.

SECTION 18.—*Signature to the contract.*

By the general statutes of Massachusetts it is provided, that, in the construction of all statutes, the words "written" and "in writing" may include printing, engraving, lithographing, and any other mode of representing words and letters; but that when the written signature of a person is required by law, it shall always be the proper handwriting of such person, or, in case he is unable to write, his proper mark.

The English statutes and the statutes of the several States require that the agreement or memorandum of an agreement to answer for the debt, default or miscarriage of another, shall be signed by the party to be charged, or by some person thereunto lawfully authorized.<sup>1</sup>

In construing these statutes it has been held that a memorandum of the agreement containing the names of the parties and the terms of the agreement, written in a book with a lead pencil by the agent of the party to be charged, is a sufficient compliance with the statute, although the memorandum is not signed by the parties, and the agent's authority to act for his principal is not in writing.<sup>2</sup> But that the rule would be otherwise if the memorandum containing the names of the parties had been drawn up by any person other than the party to be charged, or his agent.<sup>3</sup>

The position of the signature of the party to be

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<sup>1</sup> See § 7, *ante*, p. 74. In some of the States the statute requires the memorandum to be signed by the "party," and in others by the "parties," to be charged. The distinction does not seem to be important, however. See *Classon v. Bailey*, 14 Johns. 487; *Corbitt v. Salem Gas-light Co.* 6 Oregon, 405; S. C. 25 Am. R. 541, 543, note.

<sup>2</sup> *Merritt v. Clason*, 12 Johns. 102; S. C. 14 Johns. 484. And see *First Baptist Church v. Bigelow*, 16 Wend. 28; *Higdon v. Thomas*, 1 Har. & Gill. 139; *Blacknall v. Parish*, 6 Jones Eq. (N. C.) 70.

<sup>3</sup> *Bailey v. Ogden*, 3 Johns. 399. But see *Douglass v. Spears*, 2 N. & M. 207; *Draper v. Pattina*, 2 Spears, 292.

charged in respect to the body of the agreement is immaterial; and the signature to the contract is sufficient within the meaning of the statute, though placed above instead of below the body of the memorandum.<sup>1</sup>

A distinction has been made in some cases between the subscription and signing of a memorandum. Thus, prior to the substitution in the New York Statute, of the word "subscribed" for the word "signed," the name of the promisor at any place upon the memorandum was held to be a compliance with the statute; but since the change, the subscription must be at the foot of the agreement which contains the engagement made. It has also been held that the law has not been changed, and that it is sufficient to meet the requirements of the statute, if the memorandum be signed by the party to be charged.<sup>2</sup>

The statute is general in its terms, and requires that some note or memorandum of the agreement shall be in writing, and signed by the parties to be charged, but does not require that the identical agreement made between the parties shall be signed, nor does it require that the note or memorandum shall be signed by both parties. It is sufficient if the note or memorandum appears in any form or paper containing the agreement, and is signed by the party to be charged therewith.<sup>3</sup> Nor does the statute require that the note or memorandum therein specified shall be made and subscribed at the time of

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<sup>1</sup> *Penniman v. Hartshorn*, 13 Mass. 87; *Clason v. Bailey*, 14 Johns. 484; *People v. Murray*, 5 Hill, 468; *Ogilvie v. Foljambe*, 3 Meriv. 53; *Profert v. Parker*, 1 Russ. & M. 625; *McConnell v. Brillhart*, 17 Ill. 354; *Wise v. Ray*, 3 Iowa, 430.

<sup>2</sup> *Kuhn v. Brown*, 1 Hun, 244; *James v. Patten*, 6 N. Y. 9; *Justice v. Lang*, 42 N. Y. 493, 518.

<sup>3</sup> *Gale v. Nixon*, 6 Cow. 445; *Kuhn v. Brown*, 1 Hun, 244; *Bird v. Munroe*, 66 Me. 571; *Morin v. Martz*, 13 Minn. 191; *Shirley v. Shirley*, 7 Blackf. 452; *Douglass v. Spears*, 2 Nott. & McC. 207; *Anderson v. Harold*, 10 Ohio, 399; *Old Colony R. R. Co. v. Evans*, 6 Gray, 31; *Barstow v. Gray*, 3 Greenl. 409. But see *Corbitt v. Salem Gaslight Co.* 6 Oregon, 405; S. C. 25 Am. R. 541.

making the agreement. It may be made and subscribed at any time afterwards, and before the time for its consummation.<sup>1</sup> A subsequent written recognition of a contract void by the statute of frauds is not only a ratification of it, but is a sufficient note or memorandum of the contract within the statute.<sup>2</sup> The signing of a telegram by an operator in sending the message, if done under the authority of the party to be charged, is equivalent to an actual, personal signing by the party, with pen and ink.<sup>3</sup> So the use of a paper with a printed signature thereon will be a sufficient compliance with the statute;<sup>4</sup> and the signature of the agent is sufficient if it is expressed in the agreement, that the contract is made for the principal.<sup>5</sup> So the signature may be made by initials, and parol evidence may be given to apply them.<sup>6</sup> An entry in its book of minutes of a resolution passed by the governing or legislative body of a municipal corporation, expressing the terms of a contract within the power of said body to make on behalf of the corporation, and the signature of the clerk of said body at the end of the day's minutes containing such resolution, constitutes a note or memorandum in writing, signed by the party to be charged, within the meaning of the statute.<sup>7</sup>

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<sup>1</sup> Webster *v.* Zielly, 52 Barb. 482. See Bird *v.* Munroe, 66 Me. 337; S. C. 22 Am. R. 571.

<sup>2</sup> Webster *v.* Zielly, 52 Barb. 482; Eilbert *v.* Finkbeiner, 68 Penn. St. 243; S. C. 8 Am. R. 156; Gale *v.* Nixon, 6 Cow. 445; Parker *v.* Barker, 1 Gray, 409; Shipperly *v.* Denison, 5 Esp. 190; Saunderson *v.* Jackson, 2 B. & P. 238; Tawney *v.* Crowther, 3 Bro. Ch. 161, 318.

<sup>3</sup> Dunning *v.* Roberts, 35 Barb. 463; Trevor *v.* Wood, 36 N. Y. 307.

<sup>4</sup> See Saunderson *v.* Jackson, 2 Bos. & Pal. 238; Schneider *v.* Norris, 2 M. & S. 286; Brainard *v.* Heydrick, 32 How. 97, 103. Except in Massachusetts. See *ante*, p. 88.

<sup>5</sup> Phillips *v.* Hooker, Phill. (N. C.) Eq. 193; Dykers *v.* Townsend, 24 N. Y. 57.

<sup>6</sup> Sanborn *v.* Flagler, 9 Allen (Mass.), 474; Palmer *v.* Stephens, 1 Denio, 471.

<sup>7</sup> Argus Company *v.* Mayor, &c. of Albany, 55 N. Y. 495. See Chase *v.* City of Lowell, 7 Gray (Mass.), 33.

Where one of the contracting parties is a national bank, the signature of its cashier, as such, is a sufficient signing.<sup>1</sup>

SECTION 19.—*What is a sufficient note or memorandum.*

The statute of frauds was passed to prevent fraud and perjury in the establishment of fictitious or misrepresented contracts; and to give it effect the courts require that not only the fact that such contract was made shall be evidenced by writing, but that the contract itself, the entire agreement with all its terms and conditions, shall be in writing. The statute does not prescribe the particular form of words in which the note or memorandum shall be made, but it makes the writing of the essence of the contract, and requires that it shall be in such terms that it can be ascertained, to a moral or reasonable certainty, what is the intention of the parties. If the agreement be vague and indefinite, so that the full intention of the parties cannot be collected from it, it cannot be said that the contract is in writing, and it is therefore void.<sup>2</sup> If the parties have used abbreviations or technical terms, or terms of trade, evidence may be given by parol to show what meaning such abbreviations and terms had acquired by usage and custom, but not in what sense the parties used them.<sup>3</sup> The agreement need not be perfect in itself, but may be made definite and certain under the statute by reference to another paper, as well as by incorporating the entire contract in one paper.<sup>4</sup> But the memorandum must either contain in itself the substantial

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<sup>1</sup> May v. National Bank of Malone, 9 Hun, 108.

<sup>2</sup> Wright v. Weeks, 25 N. Y. 153, 160.

<sup>3</sup> Cross v. Eglin, 2 Barn. & Ad. 106; Salmon Falls Man. Co. v. Goddard, 14 How. (U. S.) 446; Wright v. Weeks, 25 N. Y. 153.

<sup>4</sup> Fitzmaurice v. Bagley, 3 Ell. & E. 772; Wright v. Weeks, 25 N. Y. 153; Ide v. Staunton, 15 Vt. 685.

terms of the contract, or refer to some other writing containing them;<sup>1</sup> and the reference to another paper must be so distinct as to make that paper a part of the contract.<sup>2</sup> The parties cannot unite two papers so as to make them unitedly constitute a valid contract, unless they are physically joined, or the intention to unite them appears on the face of the papers. If the connection between the two papers depends upon oral testimony, or if the reference in the written memorandum is to something verbal, the whole evil intended to be remedied by the statute will be experienced.<sup>3</sup> The memorandum must state the contract with reasonable certainty, so that the substance of it can be understood from the writing itself, without having recourse to parol proof.<sup>4</sup>

As has been stated, the statute does not require that the identical agreement entered into between the parties shall be signed; and if the note or memorandum appears in any form of paper containing the agreement, or referring to and adopting the instrument containing the agreement, there will be a sufficient compliance with the statute.<sup>5</sup> Letters between the parties have been held sufficient to take the case out of the statute.<sup>6</sup> But otherwise of letters between one of the contracting parties and

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<sup>1</sup> *McCarty v. Kyle*, 4 Cold. (Tenn.) 348; *O'Donnell v. Brillhart*, 17 Ill. 354; *Ridgway v. Wharton*, 3 De G., M. & G. 677, 696; *Doty v. Wilder*, 15 Ill. 407; *Hagan v. Domestic Sewing Machine Company*, 4 Hun, 73; *Abeel v. Radcliff*, 13 Johns. 297; *Dodge v. Lean*, 13 Johns. 508; *Barickman v. Kuykindall*, 6 Blackf. 21.

<sup>2</sup> *Kenworthy v. Schofield*, 2 Barn. & Cress. 945; *Wright v. Weeks*, 25 N. Y. 153.

<sup>3</sup> *Wright v. Weeks*, 25 N. Y. 153; *Norris v. Blair*, 39 Ind. 90; *Freeport v. Bartol*, 3 Greenl. 340. But see *Lee v. Mahoney*, 9 Iowa, 344. See *Morton v. Dean*, 13 Metc. 385, 388; 2 Kent's Com. 511.

<sup>4</sup> *Bailey v. Ogden*, 3 Johns. 399; *Ide v. Staunton*, 15 Vt. 685; *Adams v. M'Millan*, 7 Port. 73; *Ridgway v. Ingram*, 50 Ind. 145; S. C. 19 Am. R. 706.

<sup>5</sup> *Gale v. Nixon*, 6 Cow. 445; *Kuhn v. Brown*, 1 Hun, 244; *Newton v. Bronson*, 13 N. Y. 587.

<sup>6</sup> *Foster v. Leeper*, 29 Ga. 294.



a third person not the legally authorized agent of either party.<sup>1</sup>

A written proposal signed by the party to be charged and accepted by parol, is a sufficient memorandum.<sup>2</sup> So, if a person writes his name on the back of an instrument as a guarantor, and the holder writes a contract of guaranty above it, this, in some States, will be a sufficient memorandum.<sup>3</sup> And generally it may be said that to constitute a contract there must be parties, a subject-matter, and a consideration; and in the absence of an express statute to the contrary, these essentials must be contained in the memorandum, or in the agreement referred to in the memorandum subscribed by the party to be charged. If the writing expresses a contract, no matter how informally, the statute is satisfied; but, on the other hand, if the writing does not contain a contract within itself, it fails to satisfy the statute, no matter how formal it may be.<sup>4</sup>

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<sup>1</sup> *Davis v. Moore*, 9 Rich. Law. (S. C.), 215.

<sup>2</sup> *Reuss v. Picksley*, Law. R. 1 Exch. 342; *Smith v. Neale*, 8 Eng. Com. L. 67.

<sup>3</sup> *Underwood v. Hossack*, 38 Ill. 208. But see *Jack v. Morrison*, 48 Penn. St. 113.

<sup>4</sup> *Calkins v. Falk*, 38 How. 62. See *Newbery v. Wall*, 65 N. Y. 484.

## CHAPTER VI.

### REQUISITES OF CONTRACTS BY MARRIED WOMEN.

SECTION 1.—Contracts relating to separate estates.

2.—Contracts not relating to separate estates.

#### SECTION 1.—*Contracts relating to separate estates.*

Under the statutes of many of the States, a married woman has the same right and capacity to enter into contracts concerning her separate estate, without regard to the nature of the contract, as she would have if she were unmarried.<sup>1</sup>

Where these statutes exist a married woman may bind her separate estate by any form of contract of guaranty or suretyship that would be effectual to bind any other person, provided the contract is entered into in or about a business carried on by her, or was made for the benefit of her separate estate. The test of her liability on such contracts is not whether her estate is actually benefited or not, but whether the contract has reference to, or has relation to, her separate estate.<sup>2</sup>

A married woman may, if she pleases, charge her property with the payment of any debt, and when she contracts in relation to her separate estate, or for the benefit of her separate estate, an intent to charge the payment thereon need not be evidenced by any writing.<sup>3</sup>

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<sup>1</sup> See *ante*, p. 42.

<sup>2</sup> *McVey v. Cantrell*, 70 N. Y. 295. But see *Heugh v. Jones*, 32 Penn. St. 432. The burden is on the plaintiff to show that the contract is one she is capable of making. *Nash v. Mitchell*, 71 N. Y. 199.

<sup>3</sup> See *Weir v. Groat*, 4 Hun (N. Y.), 193, 195.

SECTION 2.—*Contracts not relating to her separate estate.*

In New York and other States having similar enabling acts, it is well settled that a married woman, though not liable upon a contract of guaranty or suretyship entered into for the benefit of another, may yet make her separate estate liable, if thereby she expressly, as part of the contract, charges her estate.<sup>1</sup> But in all cases, where the contract of guaranty or suretyship is not entered into for the benefit of her estate, the intent to create a charge thereon must be a part of the contract.<sup>2</sup> The form in which this intent is expressed is unimportant. It is not necessary that the contract should describe the property to be charged. It is sufficient that it declares her intent to charge her separate estate in general terms.<sup>3</sup>

In England, and in some of the States, it has been held, that the separate property of a married woman is unanswerable in equity for her debts and engagements, to the full extent to which it is subject to her disposal, upon the ground that it is her separate estate, equitably subject to the contracts or obligations entered into by her, not binding on her personally, and which cannot be enforced by law; and equity therefor applies the remedy by appropriating the property to the satisfaction of the debt, although nothing is said in the contract in regard to her separate property, and no express charge is made on her separate property by the contract.<sup>4</sup>

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<sup>1</sup> Woolsey v. Brown, 11 Hun, 52.

<sup>2</sup> Wier v. Groat, 4 Hun, 193; White v. McNett, 33 N. Y. 371; Manhattan Brass and Manufacturing Co. v. Thompson, 58 N. Y. 80; Yale v. Dederer, 68 N. Y. 329; Corn Exchange Ins. Co. v. Babcock, 42 N. Y. 613; Kimm v. Weippert, 46 Mo. 532; S. C. 2 Am. R. 541; Willard v. Eastham, 15 Gray, 328; Williams v. Hugunin, 69 Ill. 214; S. C. 18 Am. R. 607; Gosman v. Conger, 69 N. Y. 87.

<sup>3</sup> Corn Exchange Ins. Co. v. Babcock, 42 N. Y. 613; S. C. 1 Am. R. 601.

<sup>4</sup> Owens v. Dickerson, Craig & Phil. 48; Hulme v. Tenant, 1 White's

In other States the courts do not carry the English doctrine to that extent, but limit the liability of the married woman's estate upon contracts which do not benefit her, to cases in which she has made an express charge upon it by some instrument in writing ; and hold that where she is mere surety or makes the contract for the accommodation of another without consideration received by her, the contract being void at law, equity will not enforce it against her estate, unless an express instrument makes the debt a charge upon it.<sup>1</sup> Under the laws of some of the States, it is necessary that the husband join with the wife in certain dealings in respect to her separate property. As has been already stated she may become surety for the debt of her husband, or of any other person, by executing a mortgage on her separate property in the form required by the laws of the State where the mortgage is given, and will thereupon be entitled to all the rights and subject to all the liabilities of the contract of suretyship.<sup>2</sup>

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Lead. Cas. in Eq. 324 ; *Murray v. Bonlee*, 3 Myl. & K. 209 ; *Johnson v. Cummins*, 1 C. E. Green, 97 ; *McChesney v. Brown*, 25 Gratt. (Va.) 393 ; *Burnett v. Hawfe*, 25 Gratt. (Va.) 481.

<sup>1</sup> *Willard v. Eastman*, 15 Gray, 328 ; *Hepburn v. Warner*, 112 Mass. 271 ; s. c. 17 Am. R. 86 ; *Rogers v. Ward*, 8 Allen, 387 ; *Yale v. Dederer*, 18 N. Y. 265 ; s. c. 22 N. Y. 450 ; 68 N. Y. 329 ; *Williams v. Hugunin*, 69 Ill. 214 ; s. c. 18 Am. R. 607 ; *Smith v. Williams*, 43 Conn. 409.

<sup>2</sup> *Purvis v. Carstophan*, 73 N. C. 575 ; *Short v. Battle*, 52 Ala. 456 ; *Bank of Albion v. Burns*, 46 N. Y. 170.

## CHAPTER VII.

### DELIVERY.

Section 1.—Delivery essential to the validity of the contract.

2.—What constitutes a delivery.

3.—Conditional delivery to stranger or co-obligor.

4.—Delivery of incomplete instrument.

5.—Filling blanks before delivery.

#### SECTION 1.—*Delivery essential to the validity of the contract.*

A contract of guaranty or suretyship may be complete in itself, and yet, as long as it remains in the hands of the parties executing it, be of no legal effect. Thus, if after the maker of a note places it in the hands of the payee, the latter requires that it shall be executed by a surety also, and returns it to the maker for the additional signature, the fact that a third person executes it as surety, and leaves it in the hands of the maker in its completed form, will create no contract between him and the payee so long as the maker holds and refuses to deliver it.<sup>1</sup> It is the delivery that gives legal inception to the contract. Delivery is necessary to the complete execution of a promissory note, and if the payee obtains possession of it by fraud or any unauthorized act, he can maintain no action upon it.<sup>2</sup> Other questions arise after it passes into the hands of a *bona fide* holder for value and without notice.

#### SECTION 2.—*What constitutes a delivery.*

There is a broad distinction between the mere parting with the possession of a written instrument and a legal

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<sup>1</sup> Chamberlain v. Hopps, 8 Vt. 94.

<sup>2</sup> Carter v. McClintock, 29 Mo. 464.

delivery, which is to give it effect. To constitute a legal delivery there must be not only a delivery in fact, but the act must be the act of one who has a right to deliver the instrument, and must be accompanied with an intention to deliver.<sup>1</sup> But, as will be shown, there may be acts which will not amount to a legal delivery, and yet be coupled with such circumstances as will estop a party to the instrument from denying the delivery of it.

The delivery may be absolute or conditional. If absolute, the contract takes effect immediately; but if conditional, it will take effect on the performance of the condition, unless there are circumstances connected with the case that would render the postponement of the legal operation of the instrument until the performance of the condition, inequitable.

There is a distinction to be observed between the effect of the delivery of negotiable and non-negotiable paper. The one is governed by the law merchant and the other by the law applicable to other contracts. But delivery is essential to the validity of a bond or other non-negotiable paper.<sup>2</sup> The delivery may be to the payee or to his agent,<sup>3</sup> and the delivery may be complete even though the obligation never came to the actual possession of the obligee.<sup>4</sup> A delivery to one of several obligees is a delivery to all.<sup>5</sup> A delivery of a bond to

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<sup>1</sup> *Ayers v. Milroy*, 53 Mo. 516; S. C. 14 Am. R. 465; *State Bank v. Evans*, 3 Green (N. J.) 155.

<sup>2</sup> *Wild Cat Branch v. Ball*, 45 Ind. 213; *McPherson v. Meek*, 30 Mo. 345; *Ayers v. Milroy*, 53 Mo. 516. The delivery of a bond is part of its execution; and if the bond is signed and sealed on Sunday, but is not delivered until Monday, it is valid, as it is not *executed* on Sunday. *State v. Young*, 23 Minn. 551; *Hall v. Parker*, 37 Mich. 590. Signing an official bond after it is filed adds nothing to the strength of the instrument, since, as to the additional surety, there is no delivery. *Hyner v. Dickinson*, 32 Ark. 776.

<sup>3</sup> *Madison, &c. Co. v. Stevens*, 10 Ind. 1.

<sup>4</sup> *Folly v. Vantuyle*, 9 N. J. Law (4 Halst.) 153. But see *State v. Oden*, 2 Harr. & J. 108, n.

<sup>5</sup> *Moss v. Riddle*, 5 Cranch, 351.

the obligee by one without authority to deliver it creates no liability.<sup>1</sup>

A note cannot be delivered to the payee as an escrow,<sup>2</sup> nor can a bond be so delivered to the obligee or his agent.<sup>3</sup> To have that effect the delivery must be to a third person.

A note delivered in escrow to take effect upon condition, takes effect upon the performance of the condition.<sup>4</sup>

A bond may be delivered by a surety to the principal obligor as an escrow,<sup>5</sup> and parol evidence is admissible to show the character of the delivery.<sup>6</sup>

### SECTION 3.—*Conditional delivery to stranger or co-obligor.*

It has been held that upon both principle and authority there is no difference between a conditional delivery to a stranger, and to a co-obligor, as in either case the instrument will not become operative until the condition is performed.<sup>7</sup> But this has been denied in well considered cases, and the principle of estoppel applied where a surety has clothed a co-obligor with the apparent authority to deliver what appears on its face to be a completed instrument to an obligee named therein, who has acted on the

<sup>1</sup> *Fay v. Richardson*, 7 Pick, 91; *Fitts v. Green*, 3 Dev. 29; *Whitsell v. Mebane*, 64 N. C. 345.

<sup>2</sup> *Hinshaw v. Dutton*, 59 Mo. 139. See *Worrall v. Munn*, 5 N. Y. 229.

<sup>3</sup> *State v. Chrisman*, 2 Ind. 126; *Blume v. Bowman*, 2 Ired. 338; *Perry v. Patterson*, 5 Humph. 133; *Cocks v. Barker*, 49 N. Y. 107; *Worrall v. Munn*, 5 N. Y. 229; *Gilbert v. North American Fire Ins. Co.* 23 Wend. 43; *Ordinary of New Jersey v. Thatcher*, 12 Vroom, 403; S. C. 32 Am. R. 225.

<sup>4</sup> *Taylor v. Thomas*, 13 Kansas, 217. See *Harkreader v. Clayton*, 56 Miss. 383; S. C. 31 Am. R. 369.

<sup>5</sup> *Pawling v. United States*, 4 Cranch, 219; *Ordinary of New Jersey v. Thatcher*, 12 Vroom, 403; S. C. 32 Am. R. 225; *State Bank v. Evans*, 3 Green (N. J.) 155; *Black v. Lamb*, 1 Beas. 108; 2 Id. 455.

<sup>6</sup> *Crawford v. Foster*, 6 Tex. 202.

<sup>7</sup> *Bibb v. Reid*, 3 Ala. 88; *Ayres v. Millroy*, 53 Mo. 516.

faith of the instrument without notice of the condition.<sup>1</sup> In one class of cases the courts hold that the authority, actual or apparent, of a co-obligor to deliver a bond to the obligee is merely that of a special agent; that such agent must strictly pursue his special authority, and cannot bind his principal by a departure from his instructions. In these cases no distinction is made between a conditional delivery to a stranger or to a co-obligor.

In the other class of cases a distinction is made between a conditional delivery to a stranger and to a co-obligor; and it is there admitted that if a deed or bond is committed to a stranger to be delivered by him to the obligee upon the performance of a condition or the happening of an event, a delivery before the condition is performed or the event happens, will not give effect to the bond, although the obligee may not be apprised of the terms imposed, and although there is nothing on the face of the instrument to excite his suspicions or put him upon inquiry. In such case the stranger is a mere custodian of the instrument, having no interest or semblance of interest in the subject-matter of the contract. The obligor finding the paper in his hands, is bound to know how he obtained possession of it, and by what authority he undertakes to dispose of it. It is a case of naked special agency, governed by the principles applicable to that class of agencies. All persons dealing with such agent are bound, at their peril, to inquire into the extent of his power and to understand its legal effect. The mere fact that a stranger has possession of a bond in which he has no apparent interest, is of itself sufficient to excite suspicion, and put the obligee upon inquiry as to his authority

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<sup>1</sup> See *Russell v. Freer*, 56 N. Y. 67; *Dair v. United States*, 16 Wall. 1; *Nash v. Fugate*, 24 Gratt. 202; S. C. 18 Am. R. 640; *State v. Peck*, 53 Me. 284; *State v. Pepper*, 31 Ind. 76; *McCormick v. Bay City*, 23 Mich. 457; *State v. Potter*, 63 Mo. 212; *Cutler v. Roberts*, 7 Neb. 4.



to dispose of it; and if such agent exceeds his powers, there is nothing in the manner of the appointment or the circumstances of the agency, which prevents the principal from repudiating the act. But, on the other hand, very different considerations should govern where the surety signs a bond complete in all its forms and provisions, and intrusts it to the principal obligor for a proper delivery to the obligee. The courts say that while it is true that the principal obligor has no greater power than the stranger to whose custody the bond is committed, yet the question is not what is the power conferred, but what is the power the obligee has the right to suppose is conferred; that the principal obligor has an apparent authority to deliver the instrument in its then existing form and condition, which may be fairly inferred from his connection with and possession of the paper; and that the reasonable presumption is, that he is to dispose of the bond according to the natural course of proceeding in such cases, that is, by a delivery to the obligee; and that while the agency is a special one, yet the agent being clothed with the evidence of agency for the general purpose of delivery, no secret limitations or restrictions ought to control the exercise of the power, so far as parties are concerned dealing with the agent upon the faith of the apparent power.<sup>1</sup>

But whatever may be the conclusion reached by the courts as to the effect of a delivery by an obligor to the obligee of a completed instrument in violation of the express instructions of a co-obligee, the doctrine of estoppel does not apply to the premature delivery of an instru-

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<sup>1</sup> See opinion of Staples, J., in *Nash v. Fugate*, 24 Gratt. (Va.) 202. See, also, *Smith v. Moberly*, 10 B. Monr. 226; *Millett v. Parker*, 2 Met. (Ky.) 603; *Deardorff v. Forestman*, 24 Ind. 481; *State v. Peck*, 53 Me. 284; *Passumpsic Bank v. Goss*, 31 Ind. 318.

ment incomplete and imperfect on its face;<sup>1</sup> nor where there was something in the transaction to put the obligee on inquiry; nor where the obligee has actual knowledge of the condition attached to the delivery; nor where the obligee has sustained no damage or loss, or has done no act to his own prejudice upon the faith of the instrument.

#### SECTION 4.—*Delivery of incomplete instrument.*

Where a mere blank paper is signed and sealed by a principal and others intended to be his sureties, and is left with the principal to be filled up, if he fills up the instrument and delivers it to the obligee named therein, it will be a valid instrument as to the principal but void as

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<sup>1</sup> Nash v. Fugate, 24 Gratt. 202; S. C. 18 Am. R. 640. 645; Preston v. Hull, 23 Gratt. 600; S. C. 14 Am. R. 153; Ward v. Churn, 18 Gratt. 801; Johnson v. Baker, 5 Barn. & Ald. 440.

In the case of Cutler v. Roberts (7 Neb. 4.; S. C. 29 Am. R. 371). Maxwell, J., says: "From a careful examination of the authorities, we think the following rules may be deduced:

*First.* That a bond, which is perfect on its face, apparently duly executed by all whose names appear therein, which purports to be signed and delivered by the several obligors, and is actually delivered by the principal without stipulation, reservation, or condition, cannot be avoided by the sureties upon the ground that they signed it on condition that it should not be delivered unless it should be signed by other persons who did not sign the same, if it appears that the obligee had no notice of such condition, and nothing to put him on inquiry as to the manner of its execution, provided he has been induced upon the faith of such bond to act to his own prejudice.

*Second.* That where a bond contains in the obligatory part the names of several persons as sureties, if a part sign the same with an understanding and on the condition that it is not to be delivered to the obligee until it is signed by all whose names appear in the obligatory part as sureties, it will not be valid as to those that do sign until the condition is complied with.

*Third.* If there is anything on the face of the bond, or in the attending circumstances, to apprise the obligee that the bond has been delivered by the sureties to the obligor to be delivered to the obligee only upon certain conditions, which have not been complied with, the sureties may plead the failure to comply with the conditions as a defense in an action on the bond."

to the sureties.<sup>1</sup> If the name of the principal is stated in the recital of a bail bond, but is omitted in the condition, and the instrument is so delivered, it will bind the parties thereto.<sup>2</sup> So a surety in such bond will be bound, although his name is omitted in the recital.<sup>3</sup> So a surety may assent to the delivery of a bond not signed by his principal, and be bound thereby.<sup>4</sup>

<sup>1</sup> *Penn v. Hamlett*, 27 Gratt. (Va.) 337.

<sup>2</sup> *Gorman v. State*, 38 Tex. 112; S. C. 19 Am. R. 29.

<sup>3</sup> *Danker v. Attwood*, 119 Mass. 146.

<sup>4</sup> *Wild Cat Branch v. Ball*, 45 Ind. 213. But when a bond is drawn in form to be signed by one person as principal and by another as surety, and is first signed by the surety on the express condition that the signature of the maker shall be obtained before the bond is used, the surety will not be bound until such signature is obtained. *Guild v. Thomas*, 54 Ala. 414; *Fales v. Filley*, 2 Mo. App. 345; *Hull v. Parker*, 37 Mich. 590.

In a recent case in Kentucky, the court laid down the following rule: Where several persons are named as sureties in the body of a bond, and some sign and deliver it to the principal upon the condition or agreement that all the parties named therein are to sign it before delivery to the obligee, such of the sureties as so sign the bond are not bound until it is executed by all the parties named therein, unless they waive the right to have it executed by all, or consent to its delivery to the obligee without being so executed. When a bond is signed by part of the sureties named therein, and the principal procures the signatures of others in place of those named therein who do not sign it, and then delivers it to the obligee, such of the sureties named therein as signed the bond are not bound thereby, unless they consented to the substitution or to the delivery. But if the principal had stricken out the names of the sureties named in the bond who did not sign it, and had inserted in the place thereof the names of those who signed it in their place, before delivery and without the knowledge or consent of the obligee, the obligee would have the right to presume that the substitution or change had been made with the knowledge or consent of all who signed the bond, and in such case all who signed it would be bound by the bond. If the signature of one surety has been forged, the genuine signature of another surety to the same paper is a guaranty to the obligee that the forged signature is genuine. The obligee has a right to presume that the maker of the genuine signature would not sign the paper if the name of the other surety had been forged, and, therefore, the maker of the genuine signature is bound, notwithstanding the forgery of the signature of his co-surety. *Hall v. Smith*, 14 Bush, 604; S. C. 29 Am. R. 377, note.

But it is held in Indiana, that where a surety signs a bond and intrusts it to the principal on condition that it shall also be signed by another whose

SECTION 5.—*Filling blanks before delivery.*

A writing executed with all the solemnities of a deed, and intended for a bond, is a mere nullity if it does not contain the name, or in some unmistakable manner designate the obligee. It becomes a deed when the name of the obligee is inserted and delivery made by the obligor, or some one legally authorized by him. The blank for the name of the obligee may be filled by an agent duly authorized; and the only question is as to the nature of the authority. In some cases it is held that an agent authorized by parol only, cannot, by filling the blank, make what was before a mere piece of waste paper a binding instrument.<sup>1</sup> In other cases it is held that parol authority is sufficient.<sup>2</sup> A bond may be filled up by the principal obligor with the names of the sureties and the amount of the penalty after the instrument has been signed by the sureties, and the bond still be held a

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name appears in the body of the bond as co-surety, a subsequent delivery of the bond, without such signature and after the erasure of the name of the co-surety from the body of the bond, will not render the surety who signed it liable thereon, as the fact that the name of such co-surety having been once inserted, was notice to the obligee that it was expected at the time it was placed there, that the co-surety would execute the bond, and this fact coupled with the erasure was enough to put a prudent man on inquiry as to the circumstances of the erasure, and whether it was not expected by the sureties who executed the bond, that the surety whose name was erased would execute it also. *Allen v. Marney*, 65 Ind. 398; s. c. 32 Am. R. 73.

<sup>1</sup> *Preston v. Hull*, 23 Gratt. 600; s. c. 14 Am. R. 153; *Upton v. Archer*, 41 Cal. 85; s. c. 10 Am. R. 266; see *Squire v. Whitton*, 1 H. L. Cases, 333; *Swan v. North British Australasian Co.* 8 Jur. N. S. 490; *Cross v. State Bank*, 5 Pike (Ark.), 525; *Mano v. Werthing*, 5 Scam. 26; *Bragg v. Fessenden*, 11 Ill. 544; *Ingram v. Little*, 11 Ga. 174; *Cummins v. Cassily*, 5 B. Mon. 435; *Burns v. Lynde*, 6 Allen, 305; *Williams v. Crutcher*, 5 How. (Miss.) 71; *Graham v. Holt*, 3 Ired. 300; *Wallace v. Harmstad*, 3 Harris, 468.

<sup>2</sup> *Field v. Stagg*, 52 Mo. 534; s. c. 14 Am. R. 435; *Van Etta v. Evenson*, 28 Wis. 33; s. c. 9 Am. R. 486. See, also, *Inhabitants of South Berwick v. Huntress*, 53 Me. 89; *Gibbs v. Frost*, 4 Ala. 270; *Bank v. Hammond*, 1 Rich, 281; *Camden Bank v. Hall*, 2 Green, 383.

valid instrument, if the subsequent acts of the sureties have been such that a jury might infer that authority had been given to fill the blanks, or that the sureties had ratified the act of the principal.<sup>1</sup> But it has also been held that a bond signed by a person before the name of the obligee or the amount has been inserted, cannot be recovered upon, although payments have been made thereon.<sup>2</sup>

If a surety signs a note in blank and leaves it with the principal for negotiation, and the latter changes the figures placed by the surety in the margin, and fills it up for a larger amount, the note will be valid.<sup>3</sup>

And if a person either indorses or signs a promissory note and intrusts it to another to raise money upon, he thereby authorizes that person to fill a blank for the payees name<sup>4</sup> or any other blank which needs to be filled to make it a perfect instrument.<sup>5</sup> So if a promissory note, perfect in all its parts, except that the date is left blank, is signed by a principal and surety, and left with the principal for delivery to the payee, the principal has an implied authority to insert the true date in the blank space, but no other.<sup>6</sup>

How far an alteration of an instrument will operate to discharge a surety or guarantor will be considered

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<sup>1</sup> *Bartlett v. Board of Education*, 59 Ill. 364.

<sup>2</sup> *Barden v. Sutherland*, 70 N. C. 528.

<sup>3</sup> *Schryver v. Hawkes*, 22 Ohio St. 308. Authority to fill blanks in a sealed instrument may be given by parol, or implied from circumstances. *State v. Young*, 23 Minn. 551.

<sup>4</sup> *Angle v. N. W. Mut. Life Ins. Co.* 92 U. S. 330; *Rich v. Starbuck*, 51 Ind. 87.

<sup>5</sup> *Gillaspie v. Kelley*, 41 Ind. 158; *Abbott v. Rose*, 62 Me. 194. See *Redlich v. Doll*, 54 N. Y. 234.

<sup>6</sup> *Emmons v. Meeker*, 55 Ind. 321. An alteration of a stolen bond by the thief will not impair the title of the true owner. *Force v. City of Elizabeth*, 28 N. J. Eq. 403. And while the defacement of the seal by the obligee will avoid the bond, the same act by a stranger will not have that effect. *Evans v. Williamson*, 79 N. C. 86.

hereafter. It is a general rule, and well supported by authority, that any species of commercial paper may, at delivery, be left entirely blank above the signature, or in the form of an ordinary printed bill or note with the material parts in blank, and the spaces may be filled in with any date, time of payment, amount, place of payment or payee, provided this be done consistently with the legal import or tenor of the form signed or indorsed.<sup>1</sup> Where the guaranty of an instrument is sufficiently complete to disclose the intention of the guarantor and the character and extent of the liability assumed, and is in that condition signed by the guarantor for the purpose of assuming such liability, the subsequent filling of blanks left in the instrument will not vitiate it, where the matter added in no way enlarges or extends the liability.<sup>2</sup> And where words are inserted in such guaranty which are simply useful to fully express what was reasonably clear without them, authority to fill blanks left in the instrument at its execution may be presumed.<sup>3</sup> In the United States Supreme Court it is held that where a party to a negotiable instrument intrusts it to another for use, as such, with blanks not filled up, such instrument so delivered carries on its face an implied authority to fill up the blanks necessary to perfect the same, and as between such party and innocent third persons, the person to whom such instrument is so intrusted must be deemed the agent of the party who committed the instrument to his custody in filling the blanks necessary to perfect the

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<sup>1</sup> *Russell v. Langstaff*, Doug. 514; *Orick v. Colston*, 7 Grat. 189; *Douglas v. Scott*, 8 Leigh, 43; *Fullerton v. Sturgess*, 4 Ohio (N. S.) 529; *Bank of Commerce v. Curry*, 2 Dana, 143; *Huntington v. Bank*, 3 Ala. 186; *Norwich Bank v. Hyde*, 13 Conn. 279; *Visher v. Webster*, 8 Cal. 109; *Spiller v. James*, 32 Ind. 202; *Mitchell v. Culver*, 7 Cow. 336; *Michigan Bank v. Eldred*, 9 Wall. 544.

<sup>2</sup> *Kinney v. Schmidt*, 12 Hun. 521.

<sup>3</sup> *Kinney v. Schmidt*, 12 Hun. 521.

instrument; but that the custody of the paper under such circumstances does not confer authority to make any addition to the terms of the note, or to make a new instrument by erasing what is written or printed, or by filling the blanks with stipulations repugnant to the plainly expressed intention of the instrument as shown by its written or printed terms; and if any such addition or alteration is made without the consent of the party from whom the paper was received, it will avoid the note even in the hands of an innocent holder.<sup>1</sup>

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<sup>1</sup> *Angle v. Northwestern Ins. Co.* 92 U. S. 330; *Bank of Pittsburgh v. Neal*, 22 How. U. S. 96. The fact that the note was not negotiable will not change the rule. *Frazier v. Gains*, 58 Tenn. 92. A violation of the instructions given by the surety as to the filling of blanks is not an alteration. *Waldron v. Young*, 9 Heisk. (Tenn.) 777.

## CHAPTER VIII.

### CONSTRUCTION OF CONTRACTS OF GUARANTY AND SURETYSHIP.

- Section 1.—General rules of construction.  
2.—Guaranties of payment and collection.  
3.—Indorsements in blank.  
4.—Guaranty of overdue notes.  
5.—Signatures to notes.  
6.—Letters of credit.  
7.—Continuing and non-continuing guaranties.  
8.—Indemnities against official misconduct.  
9.—Statutory undertakings.  
10.—Bonds of indemnity,

#### SECTION 1.—*General rules of construction.*

The same want of harmony that characterizes the decisions in respect to other questions relating to contracts of guaranty and suretyship is found among the decisions relating to the construction of these contracts. A learned jurist, in delivering the opinion of the court in a recent case in New York, says, "I have examined a great number of cases in the English as well as American reports, in which the construction of guaranties has been involved, hoping to deduce from them some principles which would enable us to decide the case at bar, without adding another to the multitude of cases which rest on their own facts, and are supported only by the adjudications in the cases themselves. I very much doubt whether it is possible to arrive at any principle which can be followed, except in now and then a case, for the reason that so much must always depend on the language of the guaranty, and still more on the intention of the parties, as derived from the guaranty and the circum-



stances under which it is drawn, that rules become general in the terms used to express them, and but few cases will occur to which they will apply.”<sup>1</sup>

Starting, then, with the certainty that the principles of construction of this class of contracts cannot be reduced to general rules of universal application, it only remains to examine the cases themselves, and from them extract as far as may be such principles of construction as are reasonably well settled. In a late case in New York the court says, “There is no rule exclusively applicable to instruments of suretyship and requiring them to be in all cases interpreted with stringency and critical acumen in favor of the surety and against the creditor, and all ambiguities to be resolved to the advantage of the promisor, and every liability excluded from the operation that can by a strained and refined construction be deemed outside of the agreement. In guaranties, letters of credit, and other obligations of sureties, the terms used and the language employed are to have a reasonable interpretation, according to the intent of the parties as disclosed by the instrument, read in the light of the surrounding circumstances and the purposes for which it was made. If the terms are ambiguous the ambiguity may be explained by reference to the circumstances surrounding the parties, and by such aids as are allowable in other cases; and, if an ambiguity still remains, the same rule which holds in regard to other instruments should apply; and if the surety has left anything ambiguous in his expressions, the ambiguity be taken most strongly against him. This certainly should be the rule to the extent that the creditor has in good faith acted upon and given credit to the supposed intent of the surety. He is not liable on an implied engagement, and his obligation cannot be extended by

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<sup>1</sup> *Crist v. Burlingame*, 62 Barb. 351, 354.

construction or implication beyond the precise terms of the instrument by which he has become surety. But in such instruments the meaning of the written language is to be ascertained in the same manner and by the same rules as in other instruments; and when the meaning is ascertained effect is to be given to it."<sup>1</sup>

In a leading English case the court said that the words of a guaranty were to be construed as strongly against the party giving it as the sense of them would admit,<sup>2</sup> and this rule of construction has been applied to these contracts by the United States Supreme Court.<sup>3</sup>

In one English case it was said to be the duty of a party who takes a guaranty to see that it is couched in such words that the party giving it may distinctly understand to what extent he is binding himself;<sup>4</sup> and in another this principle of construction was questioned, and it was held that the words of every instrument are to be taken most strongly against the party using them.<sup>5</sup> Lord Ellenborough said, "If a party means to be surety for a single dealing he should take care to say so;"<sup>6</sup> while Chief-Justice Marshall said that the law will not compel a man to pay a debt in which he has no interest, unless he has manifested a clear intention to make himself liable.<sup>7</sup> Chancellor Kent lays down the rule that "a guaranty is to be construed liberally for the purpose of

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<sup>1</sup> *Belloni v. Freeborn*, 63 N. Y. 383. For other New York cases discussing this question, see *Gates v. McKee*, 13 N. Y. 232; *Poppenhusen v. Seeley*, 3 Keyes, 180; *Hamilton v. Van Rensselaer*, 43 N. Y. 244; *Melick v. Knox*, 44 N. Y. 677; *Agawam Bank v. Strever*, 18 N. Y. 502; *Western N. Y. Life Ins. Co. v. Clinton*, 66 N. Y. 326; *Griffiths v. Hardenbergh*, 41 N. Y. 464; *Matter of the New York Central R. R. Co.* 49 N. Y. 414.

<sup>2</sup> *Mason v. Pritchard*, 12 East. 227.

<sup>3</sup> *Drummond v. Prestman*, 12 Wheat. 515.

<sup>4</sup> *Nicholson v. Poget*, 1 C. & M. 48.

<sup>5</sup> *Mayer v. Isaac*, 6 Mees. & Welsb. 605.

<sup>6</sup> *Merle v. Wells*, 2 Camp. 413.

<sup>7</sup> *Russell v. Clark's Executors*, 7 Cranch, 97.

ascertaining its latitude or the interests of the parties to it.”<sup>1</sup> Justice Story expresses the rule in nearly the same language, but qualifies it by saying: “By a liberal interpretation we do not mean that the words shall be forced out of their natural meaning, but simply that the words should receive a fair and reasonable interpretation, so as to attain the object for which the instrument is designed, and the purposes to which it is applied.”<sup>2</sup>

There are certain rules of construction which may be relied upon with reasonable safety in the courts in which they have their origin, if in no others.

*First.* Guaranties are to be governed by the same rules of construction as other contracts.<sup>3</sup>

*Second.* The terms used and the language employed are to have a reasonable interpretation according to the intent of the parties as disclosed by the instrument read in the light of the surrounding circumstances and the purposes for which it was made.<sup>4</sup>

*Third.* That if the terms are ambiguous the ambiguity may be explained by reference to the circumstances surrounding the parties, and such other aids as are allowable in other cases of ambiguous contracts.<sup>5</sup>

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<sup>1</sup> 3 Kent's Comm. 124.

<sup>2</sup> Lawrence v. McCalmont, 2 How. 426.

<sup>3</sup> Crist v. Burlingame, 62 Barb. 35; White v. Reed, 15 Conn. 457; Walrath v. Thompson, 4 Hill, 200; Gates v. McKee, 13 N. Y. 232; Hamilton v. Van Renssalaer, 43 N. Y. 244; Belloni v. Freeborn, 63 N. Y. 383; Birdsall v. Heacock, 32 Ohio St. 177; S. C. 30 Am. R. 572. The fact that the instrument is under seal will not change its nature or construction. Jordan v. Dobbins, 122 Mass. 178; S. C. 23 Am. R. 305.

The rules here given for the construction of guaranties apply as well to contracts of suretyship; and an examination of the cases cited will show that no distinction is made by the courts between the two classes of contracts, so far as the general principles of construction are concerned.

<sup>4</sup> Belloni v. Freeborn, 63 N. Y. 383; Crist v. Burlingame, 62 Barb. 351; Lawrence v. McCalmont, 2 How. 426; Birdsall v. Heacock, 32 Ohio St. 177. See Gilligham v. Boardman, 29 Me. 79.

<sup>5</sup> Belloni v. Freeborn, 63 N. Y. 383; Western N. Y. Life Ins. Co. v. Clinton,

*Fourth.* If the ambiguity still remains, the language of the guaranty is to be construed most strongly against the guarantor.<sup>1</sup>

*Fifth.* That when the true signification of the contract has been thus ascertained, the liabilities of the guarantor cannot be extended by construction or implication beyond its precise terms.<sup>2</sup>

*Sixth.* If the guaranty is indorsed on, or refers to the principal obligation executed at the same time, the two instruments are to be construed together.<sup>3</sup>

*Seventh.* The words used in framing contracts of suretyship are to be construed in their ordinary and popular sense, and their meaning will not be extended to the prejudice of the surety.<sup>4</sup>

*Eighth.* The contract of a surety is not to be extended by construction or implication to any other subject, or any other person, or to any other period of time than that expressed or necessarily included in his contract.<sup>5</sup> The construction of guaranties will be the same in courts of equity and in courts of law; and any explanatory facts which can be received in one court, will be admitted in the other.<sup>6</sup>

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66 N. Y. 326; Griffiths v. Hardenbergh, 41 N. Y. 464; Hoad v. Grace, 7 Hurl. & Norm. 494; Stanley v. Miles, 36 Miss. 434; Field v. Munson, 47 N. Y. 221; White's Bank v. Myles, 73 N. Y. 335; Birdsall v. Heacock, 32 Ohio St. 177.

<sup>1</sup> Belloni v. Freeborn, 63 N. Y. 383; Crist v. Burlingame, 62 Barb. 351; Lawrence v. McCalmont, 2 How. 426; Bailey v. Larchar, 5 R. I. 530; Mauran v. Bullus, 16 Pet. 528. But see Stull v. Hance (62 Ill. 52), in which it is said that in cases of doubt, the doubt is generally, if not universally, solved in favor of the surety.

<sup>2</sup> Belloni v. Freeborn, 63 N. Y. 383; Hamilton v. Van Rensselaer, 43 N. Y. 244; Gates v. McKee, 13 N. Y. 232; Smith v. Montgomery, 3 Texas, 199; Birdsall v. Heacock, 32 Ohio St. 177.

<sup>3</sup> Marsh v. Chamberlain, 2 Lans. 287; Union Bank v. Coster's Executors, 3 N. Y. 203.

<sup>4</sup> McClusky v. Cromwell, 11 N. Y. 503; Chase v. McDonald, 7 Har. & J. 160.

<sup>5</sup> Burge on Suretyship, 40.

<sup>6</sup> Russell v. Clark, 7 Cranch, 69. The construction of a guaranty is a

SECTION 2.—*Guaranties of payment and collection.*

There is considerable want of harmony between the decisions of the courts of the several States, as to the construction of contracts of guaranty indorsed upon promissory notes or other obligations.

Contracts of this nature are sometimes entered into with a view of indemnifying the holder against loss, in case the note should not prove collectible after suit upon it; and, in other cases, are entered into with a view of warranting the payment of the note at maturity. The contract in the first case is a guaranty of collection, and, in the second, a guaranty of payment. These guaranties are sometimes so drawn as to cover both payment and collection. In construing contracts of this character, the courts, in doubtful cases, scrutinize the contract of the principal for the purpose of ascertaining the nature of the contract assumed by the guarantor. If the guarantor has drawn his contract in general and in definite terms, he will be held liable for all the engagements of his principal resulting from the principal's contract.<sup>1</sup> Thus, where a person indorses on the back of a promissory note the words "I guarantee the within note," the guaranty will be construed to be one of payment and not of collection;<sup>2</sup> for the reason that the contract of the principal being one of payment, and the guarantor having undertaken to answer for the principal's liability without limit-

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matter of law for the court. *Bell v. Bruen*, 1 How. (U. S.) 169; s. c. 17 Pet. 161; *Lawrence v. McCalmont*, 2 How. (U. S.) 426. But extrinsic evidence may be resorted to, to ascertain the true import of the contract. *Id*; *Walrath v. Thompson*, 4 Hill, 200. If the guaranty is written in this country, addressed to a person in another country, it will be construed according to the laws of the latter country. *Bell v. Bruen*, 1 How. (U. S.) 161.

<sup>1</sup> *Winchell v. Doty*, 15 Hun (N. Y.), 1; Story on Contracts, § 866; 2 Bouv. Inst. 58.

<sup>2</sup> *Winchell v. Doty*, 15 Hun (N. Y.), 1; see *Schultz v. Crane*, 6 Hun (N. Y.), 236; s. c. 64 N. Y. 659.

ation, his contract, though collateral, is co-extensive with that of his principal, and creates a liability for the payment of the note if the principal does not.

Guaranties are mercantile contracts, and will be construed so as to give effect to whatever is fairly presumable to be the intention and understanding of the parties, and not according to any strictly technical nicety.<sup>1</sup>

A contract of guaranty indorsed on a promissory note in the following words: "For value received I guarantee the payment and collection of the within note, with costs, if any made," is a guaranty of both payment and collection.<sup>2</sup>

The words, "I hereby guarantee the collection of the within note," has been held to be nothing more than a simple assignment under the statute of Illinois, and to create no greater liability.<sup>3</sup>

The words, "For value received we assign the within note to A. and to D. & Co., waiving demand and notice, and guarantee the payment of the same," creates a contract of guaranty and indorsement.<sup>4</sup>

An indorsement on a promissory note, before its maturity, in these words, "I guarantee the payment of the within," imparts an absolute engagement to pay the debt at maturity, in default of payment by the maker.<sup>5</sup>

A guaranty that "all drafts drawn by H. will be duly honored and paid by me, should he meet with any misfortune that he will not be able to do it himself," is a guaranty of payment and not of the drawer's solvency.<sup>6</sup>

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<sup>1</sup> Story on Cont. § 854; 2 Pars. on Cont. (5th ed.) 5; *Schultz v. Crane*, 6 Hun, 236.

<sup>2</sup> *Tuton v. Thayer*, 47 How. 180.

<sup>3</sup> *Judson v. Goodwin*, 37 Ill. 286.

<sup>4</sup> *Vanzant v. Arnold*, 31 Ga. 210.

<sup>5</sup> *Townsend v. Cowles*, 31 Ala. 428. A promise to procure a note of another to be settled and paid is substantially a guaranty of the note. *Robinson v. Gilman*, 43 N. H. 485.

<sup>6</sup> *Grant v. Hotchkiss*, 26 Barb. 63.

The indorsement, "I warrant the note good," is a guaranty that the note is collectible, and not that it will be paid on demand.<sup>1</sup>

A guaranty in the form "I have this day conveyed a note to S. against G. for \$117 39, dated, &c., which note I hold myself accountable for the payment thereof, on condition that the said S. uses proper exertions to collect the same," is a guaranty of collection and not of payment.<sup>2</sup> The words, "we guarantee the collection of the within note," are to be construed as equivalent to "we guarantee the collection of the within note by due course of law."<sup>3</sup> An indorsement made after the execution of a note, in the form "I sign the within as security," will be construed as a guaranty.<sup>4</sup>

A guaranty of a note, in addition to the obligation assumed as to its payment or collection, imports that all antecedent names in the note are genuine, and that the party subsequently indorsing and transferring it has a good title, which he transfers.<sup>5</sup>

A guaranty of a judgment generally is an engagement that it shall be paid, and not that it shall be of a certain amount.<sup>6</sup>

A guaranty that a note payable at a future day is due,

<sup>1</sup> *Curtis v. Smallman*, 14 Wend. 231; see *Hammond v. Chamberlin*, 26 Vt. 406; *Cooke v. Nathan*, 16 Barb. 342.

<sup>2</sup> *Spicer v. Norton*, 13 Barb. 542.

<sup>3</sup> *Burt v. Horner*, 5 Barb. 501; *Cady v. Sheldon*, 38 Barb. 103.

<sup>4</sup> *Goode v. Jones*, 9 Mo. 876.

A guaranty to pay, in case the holder "fail to recover the money on said note," is merely a guaranty for the collection of the note by diligent prosecution of the maker. *Jones v. Ashford*, 79 N. C. 172.

A guaranty of payment of a debt when due cannot be changed to a guaranty of collection by parol evidence of the understanding of the parties at the time of the delivery of the guaranty. *Neil v. Ohio Agricultural, &c. College*, 31 Ohio St. 15.

<sup>5</sup> *McLaughlin v. McGovern*, 34 Barb. 208; see *ante*, p. 22.

<sup>6</sup> *Oyster v. Waugh*, 4 Watts, 158.

and that the maker has nothing to file against it, will be construed to refer to the time when the note matures.<sup>1</sup> A guaranty of payment of a note at the insolvency of the drawers is a guaranty of solvency of the drawers, and binds the holder to the use of reasonable diligence in the collection of the note.<sup>2</sup>

There is considerable conflict of authority as to the import of a guaranty of collection. In some States, a guaranty that a note is collectible is held to be an undertaking, on the part of the guarantor, that if proceedings are diligently prosecuted at law for the collection of the note they shall result in collection; while, in other States, the contract is held to be a mere undertaking that the note will be collectible at maturity, or, what amounts to the same thing, that the maker will be then solvent.<sup>3</sup> These questions will be considered more fully in a subsequent chapter.

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<sup>1</sup> *Adams v. Clarke*, 14 Vt. 9.

<sup>2</sup> *Graham v. Bradley*, 5 Humph. 476. An agreement made on the transfer of a note to make it good to the transferee, "if anything should fail in the recovery of said note," is a guaranty of the solvency of the maker. *Hoover v. Clark*, 3 Murph. 169.

<sup>3</sup> The courts are at variance as to the evidence required to show that the instrument guaranteed could not be collected, or was not collectible. In New York, Texas, Wisconsin, Michigan, Kentucky, and possibly in some of the other States, it is held that the commencement of an action against the maker of a note, and its prosecution to judgment and execution without avail, is a condition precedent to the right to resort to the guarantor on a guaranty of collection, though the maker is insolvent. *Craig v. Parkis*, 40 N. Y. 181; *Shepard v. Shears*, 35 Texas, 763; *Day v. Elmore*, 4 Wis. 190; *Bosman v. Akeley*, 39 Mich. 710; s. C. 33 Am. R. 447; *Ely v. Bibb*, 4 J. J. Marsh, 71; and see *Peck v. Frink*, 10 Iowa, 193. In other States it is not necessary to attempt collection before resorting to the guarantor if the maker is insolvent. *McClurg v. Fryer*, 15 Penn. St. 293; *McDoal v. Yeomans*, 8 Watts, 361; *Sanford v. Allen*, 1 Cush. 473; *Gillighan v. Boardman*, 29 Me. 79; *Wheeler v. Lewis*, 11 Vt. 265; *Ransom v. Sherwood*, 26 Conn. 437; *Perkins v. Catlin*, 11 Conn. 213; and see *Thompson v. Armstrong*, 1 Ill. 23; *Stern v. Rockefeller*, 29 Ohio (N. S.), 625.



SECTION 3.—*Indorsements in blank.*

The construction placed by the courts of the several States upon the contract created by an indorsement in blank of a bill or note, before or after its delivery by a person not named as payee therein, has been discussed.<sup>1</sup> In some of the States the person placing his name upon a note under such circumstances is charged as an indorser, in others as a guarantor, and in others as a surety or joint maker. In some States parol evidence is admissible to show the intention of the parties at the time of the execution of the contract, as aids to its construction,<sup>2</sup> and in others such evidence is incompetent.<sup>3</sup> The question presented by these irregular contracts is not what is the construction of the guaranty created by the indorsement? but rather, does the indorsement operate to create a contract of guaranty? If it does, the contract falls under the general rules of construction of guaranties, and needs no separate discussion.

SECTION 4.—*Guaranty of overdue notes.*

The effect and interpretation of a guaranty of an overdue note or other obligation are worthy of consideration, as the contract thus created may not fall under the ordinary rules of construction.

When payment of a note is guaranteed "when due,"

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<sup>1</sup> See *ante*, p. 27.

<sup>2</sup> See *Sylvester v. Downer*, 20 Vt. 355; *Strong v. Riker*, 16 Vt. 554; *Fuller v. Scott*, 8 Kansas, 25; *Firman v. Blood*, 2 Ed. 496; *Walz v. Alback*, 37 Md. 404; *Houston v. Bruner*, 39 Ind. 375; *Seymour v. Farrell*, 51 Mo. 95; and see *ante*, p. 30. It is probable that in all the States, with the exception of New York, Massachusetts, and Pennsylvania, evidence of intention is admissible to rebut the presumption created by the blank indorsement.

<sup>3</sup> See *Jack v. Morrison*, 48 Penn. St. 113; *Eilbert v. Finkbeimer*, 68 Penn. St. 243; s. c. 8 Am. R. 176; *Draper v. Wild*, 13 Gray, 580; *Clapp v. Rice*, Id. 403; *Hall v. Newcomb*, 7 Hill, 416.

or "according to its tenor," after it is overdue, the contract must be construed with reference to the state of things then known to the parties as existing; and it being known to them that the day of payment of the note had passed, the parties must be understood as contracting with reference to a note overdue, and the guaranty is equivalent to a stipulation for the payment of a note payable on demand.<sup>1</sup>

SECTION 5.—*Signatures to notes.*

It has been stated in a preceding chapter that the relation of surety or guarantor may be created by the signature of one or more persons to a promissory note, with or without the addition of any qualification to the signature. In construing the contract so created the court may inquire as to the intention of the parties, as the same may be gathered from the signatures and from the attending circumstances. If the party qualify his signature by the addition of such technical or other words as are apt and effectual to indicate his intention and describe his true character and relationship to the transaction, his obligation will be measured by the words so used according to their legal import. But if he signs without qualification or addition, he will be presumed to intend what the law, under the circumstances, implies from such signature.<sup>2</sup>

If the signature is added to the note after its execution and delivery, and not in pursuance of any arrangement made at that time, the party so signing cannot be held as a joint promisor and maker. Such subsequent undertaking is independent of and collateral to the original, and will be construed to be either a contract of

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<sup>1</sup> Crocker v. Gilbert, 9 Cush. 131; Gunn v. Madigan, 28 Wis. 158.

<sup>2</sup> Monson v. Drakeley, 40 Conn. 552; S. C. 16 Am. R. 74.

guaranty or suretyship according to the consideration and circumstances.<sup>1</sup>

The fact that one of two or more joint-makers of a promissory note signed it as surety, may be shown by parol.<sup>2</sup>

The principal in a joint note, signed by himself and surety, may, in the absence of restrictions upon his authority, obtain as many additional sureties or guarantors as may be required to make the paper available for the purposes intended by the original makers; and the sureties and guarantors so obtained, may stipulate the terms of their liability as between themselves and prior parties. This stipulation need not be in writing; and on a question of the interpretation and extent of their obligation, the contract so made may be shown directly by parol evidence, or by facts and circumstances from which the contract will be implied.<sup>3</sup>

#### SECTION 6.—*Letters of Credit.*

Letters of credit being only one of the many different forms of contracts of guaranty, are subject to the same rules of construction as other contracts of the same general nature. The decisions are not harmonious as to the rules of construction applicable to this form of guaranty, and consequently no rules of universal application can be given; but certain general principles have been laid down by the courts that have, to a certain extent, been followed.

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<sup>1</sup> Id; *Miller v. Gaston*, 2 Hill, 191; *McCaughy v. Smith*, 27 N. Y. 39; *Tenney v. Prince*, 4 Pick. 385; *Union Bank v. Braintree*, 8 Met. 509, 510; *Bentham v. Judkins*, 13 Met. 265; *McConey v. Stanley*, 8 Cush. 85; *Stone v. White*, 8 Gray, 593; *Green v. Shepard*, 5 Allen 590.

<sup>2</sup> *Hubbard v. Gurney*, 64 N. Y. 457; *Barry v. Ransom*, 12 N. Y. 462; *Harris v. Brooks*, 21 Pick. 195; *Bank of Steubenville v. Hoge*, 6 Ohio, 17; *Davis v. Barrington*, 30 N. H. 517; *Irvine v. Adams*, 48 Wis. 817.

<sup>3</sup> *Oldham v. Brown*, 28 Ohio St. 41.

In a leading case in New York, Pratt, Justice, in delivering the opinion of the court, says: "Contracts of guaranty differ from other ordinary, simple contracts only in the nature of the evidence required to establish their validity. The statute requires every special promise to answer for the debt, default or miscarriage of another, to be in writing, subscribed by the party to be charged thereby, and expressing therein the consideration; and no parol evidence will be allowed as a substitute for these requirements of the statute. But, in other respects, the same rules of construction and evidence apply to contracts of this character which apply to other ordinary contracts; and the rule allowing two or more instruments, given at the same time and relating to the same subject-matter, to be construed together as one instrument, applies to this class of contracts; and parol evidence of the circumstances under which the contract was made may be given, to aid the court in giving a true construction to ambiguous terms therein, or to show that separate contracts relate to the same subject-matter."<sup>1</sup> Judge Story says: "We should never forget that letters of guarantee are commercial instruments, generally drawn up by merchants in brief language, sometimes inartificial, and often loose in their structure and aim; and to construe the words of such instruments with a nice and technical care, would not only defeat the intention of the parties, but render them too unsafe a basis to rely on for extensive credits, so often sought in the present active business of commerce throughout the world."<sup>2</sup>

It has been repeatedly held, that in letters of credit the terms used and the language employed are to have a reasonable interpretation, according to the intent of the

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<sup>1</sup> Union Bank v. Coster's Executors, 3 N. Y. 203, 209.

<sup>2</sup> Lawrence v. McCalmont, 2 How. (U. S.) 426.

parties as disclosed by the instrument, read in the light of the surrounding circumstances and the purposes for which they were made.<sup>1</sup> The rules heretofore given in regard to ambiguity in contracts of guaranty generally, apply as well to this form of the contract.

There is a sense, undoubtedly, in which it may be said that these obligations are to be strictly construed; and it is this—that the surety is not to be held beyond the very precise stipulations of his contract. He is not liable on any implied engagement where a party contracting for his own interest might be; and he has a right to insist upon the exact performance of any condition for which he has stipulated, whether others would consider it material or not. But where the question is as to the meaning of the written language, in which he has contracted, there is no difference, and there ought not to be any, between the contract of a surety and that of any other party.<sup>2</sup>

In addition to the general rules which have been given in respect to the construction of contracts of guaranty generally, there are others that apply specially to the class of guaranties in question.

In construing letters of credit the court must determine whether the letters create a general or special, continuing or non-continuing guaranty. Special letters of credit, as has been stated, are addressed to particular individuals by name, and are confined to them, and give no other persons the right to act upon them. General letters of credit, on the contrary, are addressed to any and every person, and give to any person to whom they may be shown authority to advance upon their credit. These

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<sup>1</sup> *Belloni v. Freeborn*, 63 N. Y. 383, 388; *Gates v. McKee*, 13 N. Y. 232; *Talmadge v. Williams*, 27 La. Ann. 653. A mercantile instrument should receive a liberal construction in furtherance of its object. *City National Bank v. Phelps*, 16 Hun, 158, 160.

<sup>2</sup> *Gates v. McKee*, 13 N. Y. 232.

general letters of credit are also subdivided into two kinds—these contemplating an open and continued credit embracing several transactions, and these that contemplate a single transaction. In the former case they are not generally confined to transactions with a single individual; but if the nature of the business which the letter of credit was intended to facilitate requires it, different individuals are authorized to make advances upon it, and it then becomes a several contract with each individual to the amount advanced by him.<sup>1</sup> It is to the interpretation of these contracts, with a view to determine to which of these classes they belong, that the rule applies that guaranties are to be construed strictly. In *Burge on Suretyship*, it is said: “The contract of suretyship is to be construed strictly; that is, the obligation is not to be extended to any other subject, to any other person, or to any other period of time than is expressed or necessarily included in it. It was in the power of the person accepting the surety to have expressed, and it is his own fault if he has not included the case to which he seeks to extend the liability of the surety.” It is the duty of the party who takes the guaranty to see that it is couched in such words that the party giving it may distinctly understand to what extent he is binding himself.<sup>2</sup>

It was a maxim of the Roman law, that “an agreement to guarantee made with one person cannot be extended to another person;” and many English and American cases have been decided on this principle, the courts holding that a letter of credit addressed to a particular person is limited to him; that the writer must be held to have granted it in reliance on his prudence and

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<sup>1</sup> *Union Bank v. Coster's Executors*, 3 N. Y. 203.

<sup>2</sup> *Nicholson v. Paget*, 1 C. & M. 48. But see *Mayer v. Isaac*, 6 Mees. & Welsb. 605; *Merle v. Wells*, 2 Camp. 413; *City National Bank v. Phelps*, 16 Hun, 158, 160.

discretion in acting upon it; that such a letter contains no general power to interpose the writer's credit, or transmit his guarantee; and that this is especially to be observed where the general terms of the letter make the personal limitation the only restraint on the responsibility of the writer.<sup>1</sup> Thus a guaranty that a factor will account for the proceeds of sales of goods furnished him to sell on commission, under a contract made with an individual member of a firm in his own name, will not be construed to cover an accounting for the proceeds of sales of goods furnished by the firm, in the absence of proof of knowledge on the part of the guarantor, at the time of executing the guaranty, that the goods were to be furnished by the firm.<sup>2</sup> So a letter of credit addressed to a firm, which has ceased to exist as a firm, will not be extended to transactions with a former member of the firm, who has acted upon it.<sup>3</sup> But where it appears by competent evidence that a letter of credit acted on by a firm, though addressed to an individual member thereof, was intended for the indemnity of the firm, the contract will be construed according to the intention of the parties.<sup>4</sup>

If A., in a letter of credit addressed to B., requests him to deliver goods to C., and B. turns C. over to D., who furnished the goods, the engagement of A. will not be construed to extend to the transaction with D.<sup>5</sup>

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<sup>1</sup> Philip *v.* Melville, cited in Burge on Suretyship, p. 78; Union Bank *v.* Coster's Executors, 3 N. Y. 203; Birkhead *v.* Brown, 5 Hill, 634; Walsh *v.* Bailie, 10 Johns. 180; Robins *v.* Bingham, 4 Johns. 496; Penoyer *v.* Watson, 16 Johns. 100.

<sup>2</sup> Barns *v.* Barrow, 61 N. Y. 39.

<sup>3</sup> Penoyer *v.* Watson, 16 Johns. 100.

<sup>4</sup> Garrett *v.* Handley, 3 B. & C. 463; s. c. 4 Id. 664. A change in the name of a banking corporation and its transformation from a State bank into a national bank will not terminate a guaranty entered into with the corporation under its old name and organization. City National Bank *v.* Phelps, 16 Hun, 158.

<sup>5</sup> Walsh *v.* Bailie, 10 Johns. 180.

SECTION 7.—*Continuing and non-continuing guaranties.*

The line of distinction between continuing and non-continuing guaranties cannot always be drawn with precision or accuracy; and in construing such contracts the courts look well to the object of obtaining the credit, and the intent of the parties as evidenced by the language of the guaranty and the surrounding circumstances.<sup>1</sup>

Parol evidence of surrounding circumstances is always admissible, to aid in determining the question whether the obligation in dispute was intended as a continuing guaranty, or as a guaranty of a single credit, if the language of the instrument itself is ambiguous.<sup>2</sup>

Hand, Senator, in *Fellows v. Prentis*,<sup>3</sup> lays down the rule by which to determine whether a guaranty is continuing or non-continuing, as follows: "When, by the terms of the guaranty, it is evident that the object is to give a standing credit to the principal, to be used from time to time, either indefinitely, or until a certain period, then the liability is continuing; but when no time is fixed, and nothing in the instrument indicates a continuance of the undertaking, the presumption is in favor of a limited liability as to time, whether the amount is limited or not. If the contract is silent, and free from all motive and consideration except voluntary assistance to a friend,

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<sup>1</sup> *White's Bank of Buffalo v. Myles*, 73 N. Y. 335.

<sup>2</sup> *White's Bank of Buffalo v. Myles*, 73 N. Y. 335. In this case the court says that where the intent cannot be ascertained by a mere perusal of the letter of credit, a resort may be had to the surrounding circumstances, the nature of the business in which the credit was to be used, the situation and relation of all the parties and their previous dealings, and the negotiations which led to the giving of the letter to enable the court to ascertain what was meant by the letter. The terms of the letter cannot be changed by such evidence, and no additional language can be imported into it. But the evidence is proper to enable the court to understand the meaning of the language used. See, also, *Heffield v. Meadows*, 4 C. P. (L. R.) 595.

<sup>3</sup> 3 Denio, 519.



I agree with Justice McLean, in *Mauran v. Bullus* (16 Pet. 537), that generally all instruments of suretyship are construed strictly as matters of legal right."

Chief Justice Shaw expresses the rule thus: "The principle to be extracted from numerous decided cases, we think, is this: that when, by the terms of the undertaking, by the recitals in the instrument, or by reference to the customs and course of dealing between the parties, it appears that the guaranty looked to a future course of dealing for an indefinite time, or a succession of credits to be given, it is to be deemed a continuing guaranty; and the amount expressed is to limit the amount for which the guarantor is to be responsible, and not the amount to which the dealing or whole credit given is to extend."<sup>1</sup>

It is held in Vermont that where the terms of a guaranty will admit of its continuance, the practical construction put upon it by all the parties is the true one,<sup>2</sup> and

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<sup>1</sup> *Bent v. Hartshorn*, 1 Metc. 24.

<sup>2</sup> *Michigan State Bank v. Peck*, 28 Vt. 200.

In a late case in New York the facts were as follows: One Cramer, carrying on a continuous business in Buffalo, was doing his banking business with the plaintiff, and had a line of discounts which he desired to continue. The plaintiff demanding more security, the debtor obtained from his father-in-law the following letter: "Please discount for Mr. Cramer to the extent of four thousand dollars. He will give you customers' paper as collateral. You can also consider me as responsible to the bank for the same." This was held to be a continuing guaranty. *White's Bank of Buffalo v. Myles*, 73 N. Y. 335. In another case a letter of credit containing the words: "I will be and am responsible for any amount which B. may draw on you for any sum not exceeding \$1,500, on condition of your acceptance of the same," was held to be a continuing guaranty. *Crist v. Burlingame*, 62 Barb. 351. The same construction was placed upon a letter of credit in the following terms: "Let T. have the paints, oils, &c., he wants. I will be security for the amount for what he will owe you" (*Boehne v. Murphy*, 46 Mo. 57; S. C. 2 Am. R. 485); and also upon a letter containing the words: "You can let D. have what goods he calls for, and I will see the same settled" (*Hotchkiss v. Barnes*, 34 Conn. 27); and upon a guaranty in which the writer says: "I will be account-

Judge Story says that in a doubtful case, the presumption should be against the construction that the guaranty is continuing,<sup>1</sup> while Lord Ellenborough held that the words should be taken most strongly against the guarantor, and if he meant to be surety for a simple dealing only, he should take care to say so.<sup>2</sup>

Illustrations of the construction placed upon guaranties by the courts of the several States might be multiplied

able to you for a credit on glass, &c., which A. may require in his business, to the extent of \$50." *Rindge v. Judson*, 24 N. Y. 64.

A.'s son, being indebted to B. for coal supplied on credit, and B. refusing to deliver more unless guaranteed, A. gave the following guaranty: "In consideration of the credit given by B. to my son for coal supplied to him, I hereby hold myself responsible as a guarantor to him for the sum of £100, and in default of his payment of any accounts due, I bind myself by this note to pay B. whatever may be owing, to an amount not exceeding the sum of £100." This guaranty was held to be continuing. *Wood v. Priestner*, Law Rep. 2 Exch. 66, 282.

The use of the future tense, as "I will guarantee" does not necessarily imply a mere offer of guaranty. *McNaughton v. Conkling*, 9 Wis. 316.

A guaranty "for any goods" that might be sold to the party named, will be construed as a guaranty limited to the specified sum on all sales of goods upon the credit of such guaranty. *Wilde v. Haycraft*, 2 Duvall (Ky.), 309.

<sup>1</sup> *Cramer v. Higginson*, 1 Mason, 223.

<sup>2</sup> *Merle v. Wells*, 2 Camp. 413. See, also, *Coles v. Puck*, (L. R.) 5 C P 65; *Mayer v. Isaac*, 6 M. & W. 605; *Rindge v. Judson*, 24 N. Y. 64; *Clark v. Burdett*, 2 Hall, 217; *City National Bank v. Phelps*, 16 Hun, 158, 160.

It has been held that a guaranty in the words; "for any sum that my son George may become indebted to you, not exceeding \$200, I will hold myself accountable (*White v. Reed*, 15 Conn. 457); or, in the words: "If you will let the bearer have what leather he wants, and charge the same to himself, I will see that you have your pay for it in a reasonable time" (*Gard v. Stevens*, 12 Mich. 292); or containing a promise "to pay for all articles of book account for which B. is now indebted, and all other articles furnished to him this day or any future day, provided said articles of book account do not exceed the sum of \$250," is not continuing.

A letter of credit containing the words, "T. wants some clothing, and expects to give his business to you. Let him have the articles he wants and I will see it paid," has been construed to be a guaranty of one immediate sale only. *Hilliard v. Hons*, 37 Texas, 717. The same construction was put upon the words: "We consider Mr. E. good for all he may want of you, and we will indemnify the same. *Whitney v. Groot*, 24 Wend. 82.

indefinitely without advantage, as the construction of the guaranty in each particular case turns rather upon the circumstances surrounding the parties at the time of the execution of the contract, and the obvious intent of the parties as gathered from extrinsic evidence of their situation and relation to each other, rather than upon the language employed; and a careful examination of the authorities by the practitioner will soon lead to the conviction that a multiplication of cases on this branch of the subject tends to confusion rather than otherwise; and that the time spent in the search for precedents to govern the construction of a particular case, could have been better employed in searching for the intention of the parties to the particular contract under consideration in the circumstances attending its execution.<sup>1</sup>

#### SECTION 8.—*Indemnities against official misconduct.*

In case of any ambiguity in the terms of any bond given to indemnify an individual or the public against any misconduct of a person acting in an official capacity, the court has a right to consider, in interpreting its meaning, all the surrounding circumstances and the relations of the parties as they existed at the time of its execution and delivery.<sup>2</sup> If the bond is conditioned for the faithful performance of the duties of a public officer, the courts will construe it with reference to the laws under which the officer was elected or appointed, both as to the commencement and duration of the liability and the nature of the acts guaranteed. Thus, if the bond is given for the faithful performance of the duties of a public officer annually elected or appointed, and it should happen that the same individual had held the

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<sup>1</sup> See *White's Bank v. Myles*, 73 N. Y. 335.

<sup>2</sup> *Western N. Y. Life Ins. Co. v. Clinton*, 66 N. Y. 326.

same office under a prior appointment, and had committed defaults during the term of that appointment, the bond of the sureties given on his re-appointment will not be construed to relate to past defaults, in the absence of special stipulations to that effect.<sup>1</sup> So, if the default occurred in a term subsequent to the one for which the bond was given, the obligation of the sureties will not be extended by construction to cover the subsequent default.<sup>2</sup> If the bond is given for an officer whose term is for a year, with power to hold until his successor qualifies, the obligation will be construed to relate to that year and a further reasonable time to permit the election and qualification of his successor.<sup>3</sup>

So the condition of the bond will be construed, and the liability of the sureties limited, in reference to the statutes defining the duties of the officer whose acts are guaranteed; and the obligation of the sureties will not be construed to relate to duties which had no statutory existence at the time of the execution of the bond, and which could not have been at the time in the contemplation of the parties.<sup>4</sup> These statutes are a part of the contract.

#### SECTION 9.—*Statutory undertakings.*

In the construction of statutory undertakings the courts will give effect to the terms of the contract, and

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<sup>1</sup> Bissell *v.* Saxton, 66 N. Y. 60; Myers *v.* United States, 1 McLean, 493; Farrar *v.* United States, 5 Pet. 372, 389; United States *v.* Boyd, 15 Pet. 187; S. C. 5 How. (U. S.) 50; Vivian *v.* Otis, 24 Wis. 518; S. C. 1 Am. R. 199; Inhabitants of Rochester *v.* Randall, 105 Mass. 295; S. C. 7 Am. R. 519.

<sup>2</sup> Arlington *v.* Merricke, 2 Saund. 403; Kingston Mutual Ins. Co. *v.* Clark, 33 Barb. 196.

<sup>3</sup> Mutual Loan and Building Association *v.* Price, 16 Fla. 204; S. C. 26 Am. R. 703; Chelmsford Co. *v.* Demarest, 7 Gray, 2; Dover *v.* Twomly, 42 N. H. 69; Supervisors of Omro *v.* Kaime, 39 Wis. 468.

<sup>4</sup> People *v.* Pennock, 60 N. Y. 421.

will not enlarge the obligation by giving a construction unwarranted by the terms actually employed for the purpose of conforming it to the requirements of the statute under which it is given.

Thus, if a statute requires that an undertaking shall be joint and several, and the undertaking actually given is joint only, courts will not construe it as a joint and several obligation.<sup>1</sup> And if the act which is relied upon as a branch of the undertaking was not included in the terms of the instrument, the sureties cannot be held liable.<sup>2</sup>

#### SECTION 10.—*Bonds of indemnity.*

The courts have experienced no little difficulty in arriving at the meaning and legal effect of that class of instruments known in law as bonds of indemnity. The meaning of the terms most commonly employed in this class of instruments seems involved in doubt; and this has led to the use of a multitude of words apparently conveying the same meaning, in the hope that some of them will express the meaning of the parties within some settled rule of construction. The word "indemnity" itself, seems to have many shades of meaning, and it seems to be an open question whether an agreement to indemnify a person against legal liability is a contract to compensate that person for all damages resulting from such liability, or a contract to protect him from liability to damages.<sup>3</sup> It has been said, also, that there is a distinction between "indemnify" and "save harmless," the latter phrase possessing the more extensive meaning.<sup>4</sup>

In many cases there is a distinction made between

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<sup>1</sup> Wood v. Fisk, 63 N. Y. 245; Davis v. Van Buren, 72 N. Y. 587.

<sup>2</sup> Palmer v. Foley, 71 N. Y. 106.

<sup>3</sup> See Weller v. Eames, 15 Minn. 461; S. C. 2 Am. R. 150.

<sup>4</sup> Carr v. Roberts, 5 Barn. & Ad. 78.

agreements to indemnify against liability and agreements to indemnify against damage, the courts holding that in the one case the condition is broken by a liability to damage, and in the other the condition is not broken until actual damage is sustained.<sup>1</sup> In other cases, an agreement to indemnify another against "any legal liability which he may have incurred," is construed as an agreement to compensate for actual damage.<sup>2</sup>

The word "molestation" in a bond conditioned that a person shall not sustain any damage or molestation by reason of any act done or liability incurred by or through another does not add to the force of the bond, the agreement of the obligors being construed as an agreement to compensate for damages.<sup>3</sup> The word "damage" is more comprehensive than "molestation;" the latter, if it has any legal meaning, being but a species of damage.<sup>4</sup>

A bond to indemnify and save harmless an officer from all costs, charges and expenses which he should incur in defending a suit, has been construed to limit the obligation of the obligors to the expenses of the defense strictly, and not to cover the damages and costs recovered by the adverse party, nor the charges of the attorneys of the officer, for which he had become liable but had not paid.<sup>5</sup> On the other hand, the word "charges" in a bond of indemnity to a public officer, conditioned to keep him harmless and indemnified of, from and against all damages, costs, *charges* and expenses that he may be put to, sustain or suffer by reason of a certain specified

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<sup>1</sup> *Gilbert v. Wiman*, 1 N. Y. 550; *Belloni v. Freeborn*, 63 N. Y. 383; *Churchill v. Hunt*, 3 Denio, 321; *Rockfeller v. Donelley*, 8 Cow. 623; *Wright v. Whiting*, 40 Barb. 235; *Jarvis v. Sewell*, 40 Barb. 449; *Port v. Jackson*, 17 Johns. 239.

<sup>2</sup> *Weller v. Eames*, 15 Minn. 461.

<sup>3</sup> *Gilbert v. Wiman*, 1 N. Y. 550.

<sup>4</sup> *Id.*

<sup>5</sup> *Scott v. Tyler*, 14 Barb. 202. But see *Bancroft v. Winspear*, 44 Barb. 209.

act, has been construed to be the equivalent for liability;<sup>1</sup> and the courts have held in substance that the construction to be given to a bond of indemnity to a public officer is not that he shall in the first instance advance his own money and then seek remuneration, but that the party covenanting shall, in the first instance, make advances so as to relieve the officer from the burden.<sup>2</sup>

It will be seen that the courts make a clear distinction, in some States at least, between a bond to indemnify against liability and one to indemnify against damage. This distinction is important, as where the contract is one merely of indemnity and not to pay, or against liability, actual damage must be shown to charge the obligors in the bond.<sup>3</sup>

The general rules relating to the construction of other contracts entered into by sureties apply to bonds of this nature. A bond given an accommodation indorser conditioned upon the payment of certain notes or a single renewal of them does not cover subsequent renewals of them.<sup>4</sup>

A bond on condition that the obligors should save and hold harmless the obligee from loss or liability for or on account of any judgments that might be obtained in certain suits, and that any judgment in such suits which the obligee should be compelled to pay should be paid by the obligors in certain proportions, was construed not to be an indemnity against liability, but against damage on such liability.<sup>5</sup>

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<sup>1</sup> *Bancroft v. Winspear*, 44 Barb. 209.

<sup>2</sup> *Rockefeller v. Donnelly*, 8 Cow. 623; *Bancroft v. Winspear*, 44 Barb. 209, 214.

<sup>3</sup> *Crippen v. Thompson*, 6 Barb. 532; *Churchill v. Hunt*, 3 Denis, 321; *Post v. Jackson*, 17 Johns. 239; *Aberdeen v. Blackmar*, 6 Hill, 324; *Lee v. Clark*, 1 Hill, 56; *Halsey v. Reed*, 9 Paige, 451; *Colbrige v. Heywood*, 9 A. & E. 633; *Reynolds v. Doyle*, 1 M. & Gr. 755.

<sup>4</sup> *Moorehead v. Duncan*, 82 Penn. St. 488.

<sup>5</sup> *Thompson v. Taylor*, 30 Wis. 68. See *Lott v. Mitchell*, 32 Cal. 23.

A bond of indemnity given by the purchaser of a private banking business to hold his vendor harmless against all existing claims against the bank cannot be construed to include claims by former customers of the bank against the vendor for frauds practiced by him in his dealings with them as banker, where the bank books show that at the time of giving the bond all claims of such customers were satisfied.<sup>1</sup>

A bond for the fidelity of a bank officer, conditioned that the obligors "shall save the president and directors of the bank harmless" from the negligence or misconduct of the officer, will be construed as a bond to save the corporation harmless, and is not satisfied by indemnifying the officers specified against individual loss. The bank may maintain an action for a breach of the bond.<sup>2</sup>

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<sup>1</sup> Hart *v.* Messenger, 2 Lans. (N. Y.) 446.

<sup>2</sup> New Orleans National Bank *v.* Wells, 28 La. Ann. 736.



## CHAPTER IX.

### LIABILITY OF SURETIES AND GUARANTORS TO CREDITORS.

- Section 1.—Two-fold liability of sureties and guarantors.
- 2.—When the liability of a surety commences.
  - 3.—When the liability of a guarantor commences.
  - 4.—When prior proceedings against the principal are necessary to fix the liability of a surety.
  - 5.—When prior proceedings against the principal are necessary to fix the liability of a guarantor.
  - 6.—How far the liability will be fixed by a judgment against or notice to the principal debtor.
  - 7.—The contract the measure of liability.
  - 8.—When the principal is not liable.
  - 9.—Liability of sureties on official bond, etc.
  - 10.—Liability on bonds and undertakings given in judicial proceedings.
  - 11.—Liability of sureties on bills and notes.
  - 12.—Liability on bonds of executors and administrators.
  - 13.—Liability as bail.
  - 14.—Liability on guardians' bonds.
  - 15.—Liability on guaranties of collection or payment.
  - 16.—Liability on bonds of indemnity.

#### SECTION I.—*Two-fold liability of sureties and guarantors.*

The liability of one of several sureties to a bond or other obligation is two-fold. Upon his direct contract he is liable to the obligee for the performance of the duty or discharge of the debt for which he is bound with his principal. To his co-surety he owes certain duties, which will be discussed in a subsequent chapter, and is contingently liable to him for the payment to him of his just proportion of the principal's debt in case the co-surety shall be legally compelled to pay more than his proportion of that debt. He may be also liable to his co-surety for the entire sum paid by the latter in dis-

charge of the principal's obligation in case the surety holds in his hands funds of the principal sufficient to discharge the debt, which have been placed in his hands for that purpose, or in case the co-surety was induced by him to enter into the contract under an express or implied contract for indemnity. This liability to a co-surety will be considered in a subsequent chapter, and in this connection only the direct liability of sureties and guarantors to the creditor will be discussed.

SECTION 2.—*When the liability of a surety commences.*

In respect to the rights of the creditor, the liability of the surety commences at the moment the contract of suretyship is executed. He is bound with his principal as an original promisor and is a debtor from the beginning.<sup>1</sup>

SECTION 3.—*When the liability of a guarantor commences.*

A guarantor is not in a legal sense a joint promisor with the principal debtor, and his liability upon his contract commences at his principal's default.<sup>2</sup>

SECTION 4.—*When prior proceedings against the principal are necessary to fix the liability of a surety.*

Ordinarily no proceedings against the principal debtor are necessary to fix the liability of his surety; and on a breach of the principal's contract an action may be brought against both principal and surety jointly. This arises from the nature of the contract the surety has entered into. In some of the States the law is well set-

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<sup>1</sup> *McMillan v. Bull's Head Bank*, 32 Ind. 11; S. C. 2 Am. R. 323.

<sup>2</sup> *McMillan v. Bull's Head Bank*, 32 Ind. 11; S. C. 2 Am. R. 323.

tled that when a public officer is removed from office and delivers his books over to his successor, but fails to pay over the public moneys in his hands, an action lies at once against the sureties in his bond without an action against his principal or even a demand on him for the balance in his hands.<sup>1</sup> So in many of the States the right to maintain an action against the sureties on an official bond without first bringing an action against the principal is given by statute.<sup>2</sup>

In some States an action against the sureties in a sheriff's official bond need not be preceded by an action or judgment against him,<sup>3</sup> while in others, before such action can be maintained, the plaintiff must be in a position to show that the act claimed to constitute a breach of the bond was an official act, and that the damage sustained by the plaintiff has been ascertained in a suit against the sheriff.<sup>4</sup>

Where an officer has exacted illegal fees, this is a breach of his official bond, and the sureties may be charged without first prosecuting the officer.<sup>5</sup> So a party injured by the trespass of an officer purporting to act under an execution may maintain an action upon his official bond without first recovering judgment against the officer alone.<sup>6</sup>

Under the statutes of Illinois no action can be maintained against the bondsmen of a tax-collector until a warrant has been issued against him.<sup>7</sup> But this is not

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<sup>1</sup> *School District v. Lyford*, 27 Wis. 506.

<sup>2</sup> See *Governor v. Raley*, 34 Ga. 173; *Hine v. Pomeroy*, 39 Vt. 211; *Bartlett v. Hunt*, 17 Wis. 214; *Moore v. Foot*, 32 Miss. 469; *Jones v. State*, 14 Ark. 170.

<sup>3</sup> *State v. Leeds*, 2 Vroom (N. J.) 185; *Von Pelt v. Littler*, 14 Cal. 194.

<sup>4</sup> *Dane v. Gilmore*, 49 Me. 173; *Covey v. Barrows*, 46 Me. 497. See *Stinson v. Hill*, 21 La. Ann. 560.

<sup>5</sup> *Kane v. Union Pacific R. R. Co.*, 5 Neb. 105.

<sup>6</sup> *Von Pelt v. Littler*, 14 Cal. 194.

<sup>7</sup> *Marks v. Butler*, 24 Ill. 567.

the law in New York in respect to collectors of city or village taxes, except in special cases where the statutes relating to warrants issued to collectors of taxes by boards of supervisors has been made applicable.<sup>1</sup>

In Arkansas no action can be maintained against the sureties on a collector's bond until the account of the collector has been adjusted by the county court and final judgment rendered therein, upon notice to him, or, after his death, to his administrators.<sup>2</sup>

Where a penal bond is payable on the breach of the condition, the principal obligor is charged with notice of the breach, and is not entitled to any notice or request before action on the bond. His co-obligors, being sureties only as between themselves and their principal are liable to the obligee as principals, and in the absence of some statutory requirement to the contrary, are not entitled to any notice or request to which their principal would not be entitled.<sup>3</sup>

The condition of a bond given by an executor or administrator differs in many respects from that contained in a bond given by a public officer. An action against an administrator and his sureties on account of the neglect of the administrator to settle his account will not lie until the administrator has been cited before the proper court for that purpose;<sup>4</sup> and no action can be maintained by a creditor on the bond of an administrator for non-payment of his claim until he has obtained a specific order of the court directing payment of the claim.<sup>5</sup> So a distributee cannot maintain an action on the bond of an administrator until his right, and the

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<sup>1</sup> Warren *v.* Phillips, 30 Barb. 646.

<sup>2</sup> Goree *v.* State, 22 Ark. 236.

<sup>3</sup> Bulkley *v.* Finch, 37 Conn. 71.

<sup>4</sup> Gilbert *v.* Duncan, 65 Me. 469.

<sup>5</sup> Probate Court *v.* Kent, 49 Vt. 380.

amount of it, has been ascertained by a decree of the proper court.<sup>1</sup>

Under the statutes of Michigan,<sup>2</sup> where an executor, who is also residuary legatee under the will, has given a bond conditioned for the payment of the debts and legacies, it is not a condition precedent to an action on the bond for non-payment of a legacy that the probate court first order the payment of the legacies.<sup>3</sup>

In some of the States it is held that the sureties in an administrator's bond are not liable until a judgment of the court fixing the liability of the administrator,<sup>4</sup> and until a *devastavit* has been established according to law.<sup>5</sup> In other States the recovery of a judgment against the principal alone is not required before action on the bond.<sup>6</sup>

The Mississippi Code dispenses with a separate action against the administrator to fix his personal liability, and

<sup>1</sup> Dobbins v. Halfacre, 52 Miss. 561. See Dawson v. Dawson, 25 Ohio St. 443.

<sup>2</sup> Compiled Laws of 1871, § 4366.

<sup>3</sup> Hatheway v. Sackett, 32 Mich. 97.

<sup>4</sup> Young v. Duhme, 4 Met. (Ky.) 239; Williams v. Cushing, 34 Me. 370; Justices, &c. v. Sloan, 7 Ga. 31; Dinkins v. Bailey, 23 Miss. 274; Eaton v. Bemfield, 2 Blackf. 52.

<sup>5</sup> Cameron v. Justices, Kelly, 36; Biggs v. Posthwait, Breese, 154; Braxton v. Winslow, 1 Wash. 31.

<sup>6</sup> Strickland v. Murphy, 7 Jones Law (N. C.), 242; Francis v. Northcote, 6 Texas, 185; Hobbs v. Middleton, 1 J. J. Marsh. 176; Chairman of the Court v. Moore, 2 Murph. 22.

In an action on the bond of a general guardian appointed by a surrogate in the State of New York, it was said in a *per curiam* opinion, that the guardian must be first called to account in Chancery, where the jurisdiction as to such trusts exclusively belongs, before the surety is liable. Stillwell v. Mills, 19 Johns. 304. See, also, Wiser v. Blachley, 1 Johns. Ch. 607; Salisbury v. Van Hoesan, 3 Hill, 77. But in later cases this doctrine has not been fully adopted, and it is now held, in that State, that an accounting by a guardian is not a prerequisite to an action against the sureties on his bond in those cases in which the extent of his liability has been otherwise as definitely determined as it could be by an accounting.

Girvin v. Hickman, 21 Hun, 316; Brown v. Snell, 57 N. Y. 286.

permits the *devastavit* to be primarily litigated in the action on his bond.<sup>1</sup>

Under the Code of Civil Procedure of New York, a plaintiff in the action on an official bond, must, when the alleged breach consists in the non-payment of money, show either that he has recovered a judgment against the officer, or that he has demanded the money from him, or that a demand cannot be made with due diligence.<sup>2</sup>

Most of the requirements as to proceedings against a principal to fix the liability of a surety are purely statutory, and cannot be fully given without an extended citation of statutes which would be merely of local value.

SECTION 5.—*When prior proceedings against the principal are necessary to fix the liability of a guarantor.*

As a general rule, a guarantor, upon the failure of his principal to perform his contract, becomes liable to a suit by the holder of the guaranty without previous suit against the defaulting contractor.<sup>3</sup> No proceedings against the maker of a note are necessary to fix the liability of a guarantor whose contract is an absolute unconditional guaranty of payment.<sup>4</sup> But it is said, that where a person contracts generally to pay the debts of another, no action can be maintained against the guarantor until payment has been demanded of the principal debtor.<sup>5</sup>

An entirely different rule applies to guaranties of

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<sup>1</sup> Dobbins v. Halfacre, 52 Miss. 561; Miss. Code, 1871, § 1180.

<sup>2</sup> N. Y. Code of Civil Pro. § 1891. See Girvin v. Hickman, 21 Hun, 316.

<sup>3</sup> Prentiss v. Garland, 64 Me. 155.

<sup>4</sup> Penny v. Crane Brothers Manuf. Co. 80 Ill. 244; Clay v. Edgerton, 19 Ohio St. 549.

<sup>5</sup> Durham v. Bischoff, 47 Ind. 211.

collection. In New York, Texas, Wisconsin, Michigan, and possibly in some of the other States, the commencement of an action against the maker of a promissory note and its prosecution to judgment and execution without avail, are conditions precedent to the right to maintain an action against one who has guaranteed its collection, without regard to the question of the maker's solvency.<sup>1</sup>

In all, or nearly all of the other States, a suit against the maker of the note is not required before proceeding against the guarantor, if the maker of the note is, at its maturity, wholly and clearly insolvent, so that an action against him would be a mere idle ceremony.<sup>2</sup> But nothing but such insolvency will, in any State, excuse a failure to proceed against the principal debtor before action against a guarantor of collection.

When the guaranty is so drawn as to include both payment and collection, the holder has his election either to proceed in the first instance against the principal or against the guarantor.<sup>3</sup>

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<sup>1</sup> *Northern Ins. Co. v. Wright*, 76 N. Y. 445; *Craig v. Parkis*, 40 N. Y. 181; *McMurray v. Noyes*, 72 N. Y. 523; *Moakley v. Riggs*, 19 Johns. 69; *Thomas v. Woods*, 4 Cow. 173; *Burt v. Horner*, 5 Barb. 501; *Loveland v. Shepard*, 2 Hill, 139; *Allison v. Waldham*, 34 Ill. 132; *Shepard v. Shears*, 35 Texas, 763; *Dyer v. Gibson*, 16 Wis. 557; *French v. Marsh*, 29 Wis. 649; *Aldrich v. Chubb*, 35 Mich. 350. The same principle applies, of course, to a guaranty of collection or any other obligation, and in many of the cases cited, the question is discussed in reference to the guaranty of bonds and mortgages. See *Vanderbilt v. Schreyer*, 21 Hun, 537; *McMurray v. Noyes*, 72 N. Y. 523; *Northern Ins. Co. v. Wright*, 76 N. Y. 445.

<sup>2</sup> See *Bruton v. Fletcher*, 31 Vt. 418; *Bull v. Bliss*, 30 Vt. 127; *Dana v. Conant*, 30 Vt. 246; *Brackett v. Rich*, 23 Minn. 485; *Stone v. Rockefeller*, 29 Ohio St. 625; *Perkins v. Catlin*, 11 Conn. 213; *Ransom v. Sherwood*, 26 Conn. 437; *Gilligham v. Boardman*, 29 Me. 79; *McDoual v. Yeomans*, 8 Watts, 361; *McClurg v. Fryer*, 15 Penn. St. 293; *Marsh v. Day*, 18 Pick. 321; *Sanford v. Allen*, 1 Cush. 473; *Camden v. Doremus*, 8 How. (U. S.) 515.

<sup>3</sup> *Tuton v. Thayer*, 47 How. 180.

SECTION 6.—*How far the liability will be fixed by a judgment against or notice to the principal debtor.*

At common law, a mere surety for the payment of a debt, without any agreement, express or implied, to be bound by a suit between the principal parties is no more affected by its event, if against him, than a mere stranger.<sup>1</sup> Except in cases where upon a fair construction of the contract, the surety may be held to have undertaken to indemnify his principal against the result of a suit, or where he is made a privy to a suit by notice and the opportunity to defend being given to him, a judgment against the principal is proof against the surety only of the fact of its recovery, and not that the facts *in pais*, against which the surety agreed to indemnify, were established in the litigation.<sup>2</sup>

Covenants to indemnify against the consequences of a suit are of two classes. The first includes those cases where the covenantor has expressly made his liability depend on the event of a litigation to which he is not a party, and stipulates to abide the result; and the second includes those cases where the covenant is one of general indemnity merely, against claims or suits. In cases of the first class, the judgment is conclusive against the indemnitor although he was not a party, and had no notice, for its recovery is the event against which he covenanted.<sup>3</sup> In those of the second class, the want of notice does not go to the cause of action, but the judgment is *prima facie* evidence only against the indemnitor, and he

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<sup>1</sup> Thomas v. Hubbel, 15 N. Y. 405; Miller v. White, 50 N. Y. 137, 142; Moss v. McCullough, 5 Hill, 131; Jackson v. Griswold, 4 Hill, 522; Giltinan v. Strong, 64 Penn. St. 242.

<sup>2</sup> Thomas v. Hubbell, 15 N. Y. 405.

<sup>3</sup> Patton v. Caldwell, 1 Dall. 419; Bridgeport Ins. Co. v. Wilson, 34 N. Y. 275.



may be let in to show that the principal had a good defense to the claim.<sup>1</sup> In each of the two classes of cases above-mentioned, the indemnitor is understood as saving the right, which the law gives in every case where the suit is between third persons, of contesting the proceeding on the ground of collusion, for the purpose of charging him.<sup>2</sup> The same rules in respect to notice, which apply to the indemnitor, are applicable to his surety in like cases.<sup>3</sup>

The sureties on a deputy sheriff's bond are not concluded by a recovery against the sheriff, where they had no opportunity to appear and defend.<sup>4</sup> But it is held that in an action on the bond of a deputy sheriff, his sureties are concluded by a judgment in an action against the sheriff which their principal had notice to defend;<sup>5</sup> and that such judgment is conclusive not only as to the liability, but, also, as to the amount.<sup>6</sup> So, where a decree made upon the final accounting of an administratrix in a surrogate's court directs the administratrix to pay the claim of a creditor, the sureties in her bond will be bound by the decree of the surrogate, for the reason that by their contract they have made themselves privy to the proceedings against their principal, and when the principal is concluded, the surety, in the absence of fraud or collusion, is concluded also.<sup>7</sup> But the decree is not so far conclusive

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<sup>1</sup> *Duffield v. Scott*, 3 Term R. 374; *Smith v. Compton*, 3 B. & A. 407; *Lee v. Clark*, 1 Hill, 56; *Rapelye v. Prince*, 4 Hill, 119; *Aberdeen v. Blackmar*, 6 Hill, 324; *Bridgeport Ins. Co. v. Wilson*, 34 N. Y. 275.

<sup>2</sup> *Bridgeport Ins. Co. v. Wilson*, 34 N. Y. 275. See *Douglass v. Howland*, 24 Wend. 35.

<sup>3</sup> *Bridgeport Ins. Co. v. Wilson*, 34 N. Y. 275; *Lee v. Clark*, 1 Hill, 56.

<sup>4</sup> *Thomas v. Hubbell*, 35 N. Y. 120.

<sup>5</sup> *Fay v. Ames*, 44 Barb. 327.

<sup>6</sup> *Kettle v. Lipe*, 6 Barb. 467.

<sup>7</sup> *Casoni v. Jerome*, 58 N. Y. 315; *Douglass v. Howland*, 24 Wend. 35; *Thayer v. Clark*, 48 Barb. 243. A judgment in favor of an administrator will be a bar to an action upon the same subject-matter against the sureties on his bond. *State v. Coste*, 36 Mo. 437.

as to prohibit the sureties from showing in an action against them, as sureties, that the judgment was recovered through fraud and collusion on the part of their principal,<sup>1</sup> nor that the surrogate had no jurisdiction to pronounce the judgment or decree.<sup>2</sup>

An order made upon a guardian in a proceeding for an account, is conclusive upon his sureties.<sup>3</sup> So, where a person has become a surety for a plaintiff in a suit in equity by signing an injunction bond, he has voluntarily assumed such a connection with that suit as to be concluded by the decree therein, and will be prohibited from contesting the matters therein decided in a subsequent action at law upon the bond.<sup>4</sup> So, issues tried and determined in an action of replevin cannot be again contested in an action on the replevin bond.<sup>5</sup> So, in an action against a constable and his sureties on his official bond, for taking the property of the plaintiff under a writ of replevin against a third person, a judgment against the constable in the action of trespass for taking the property, is *prima facie* evidence, although the sureties had no notice of the action against their principal.<sup>6</sup>

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<sup>1</sup> Annett v. Terry, 35 N. Y. 256. A judgment obtained against a sheriff for official neglect, without notice to his sureties, is not binding on them if obtained by fraud or collusion. But the sureties cannot avoid the judgment by simply showing facts as existing which the sheriff might and ought to have shown in defense. Dane v. Gilmore, 51 Me. 544. See Bradley v. Chamberlain, 35 Vt. 277. As to the right of the sureties to impeach a judgment against their principal for fraud and collusion, see Great Falls, &c. Co. v. Worcester, 45 N. H. 110; Douglass v. Howland, 24 Wend. 35.

<sup>2</sup> Casoni v. Jerome, 58 N. Y. 315. That a judgment of a probate court against an executor or administrator is only *prima facie* evidence against the surety, and not conclusive. See Lipscomb v. Postell, 38 Miss. 476; People v. Townsend, 37 Barb. 520.

<sup>3</sup> Brown v. Balde, 3 Lans. 283.

<sup>4</sup> Towle v. Towle, 46 N. H. 432.

<sup>5</sup> Denny v. Reynolds, 24 Ind. 248. So, a judgment against a surety in a replevin bond will furnish *prima facie* evidence of the amount the surety is entitled to recover as damages against his principal. Lyon v. Northrop, 17 Iowa, 314.

<sup>6</sup> State v. Jennings, 14 Ohio, N. S. 73. In Tracy v. Goodwin, 5 Allen

The question whether sureties in an official bond are bound in any way by a judgment against their principal, in an action not brought upon such bond, for a breach of duty which they have covenanted against, is not harmoniously decided in all the courts. In a recent case in Wisconsin, the court, after examining a great number of decisions in which the question had been discussed and decided, held that a judgment against the principal in an official bond, was admissible as evidence against the sureties, and was, at least, presumptive evidence of the right of the plaintiff to recover and of the amount of such recovery, where the execution of the bond is proved or admitted, and the record of the former judgment shows that the recovery was for acts or omissions, the proof of which would be a breach of some one or more of the conditions of the bond.<sup>1</sup>

It may be stated as a general rule, supported by the weight of authority, that when one is responsible, by force of law or contract, for the faithful performance of the duty of another, a judgment against that other for the failure of the performance of such duty, if not conclusive, is *prima facie* evidence, in a suit against the party so responsible for that other. If it can be made to appear that such judgment was obtained by fraud or collusion, it will be wholly set aside. But otherwise it is *prima facie* evidence to stand until impeached or contradicted, in whole or in part by countervailing proofs.<sup>2</sup>

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(Mass.) 409, it was held that a judgment against a constable for a wrongful attachment of the goods of a third person on a writ, if recovered without fraud or collusion, is conclusive evidence both as to damages and costs, in an action against him and his sureties on his bond, executed by them jointly and not severally.

<sup>1</sup> Stephens v. Shafer, 48 Wis. 54; S. C. 33 Am. R. 793; 21 Alb. Law. J. 109.

<sup>2</sup> Shaw, Ch. J., in City of Lowell v. Parker, 10 Metc. 309, 315. See, also, Lee v. Clark, 1 Hill, 56; Franklin v. Hunt, 2 Hill, 671; Westervelt v. Smith, 2 Duer, 449; Annett v. Terry, 35 N. Y. 256; Fay v. Ames, 44 Barb. 327;

Under the New York Code of Civil Procedure, where a judgment has been rendered against a sheriff in an action brought for the escape of a civil prisoner admitted to the jail liberties, and due notice of the pendency of the action was given to the prisoner and his sureties, to enable them to defend the same, the judgment against the sheriff is conclusive evidence of his right to recover against the prisoner and his sureties to whom the notice was given, as to any matter which was or might have been controverted in the action against the sheriff.<sup>1</sup>

SECTION 7.—*The contract the measure of liability.*

Whatever may be the rule of law adopted by the courts in construing contracts of suretyship, it is a principle universally recognized, that when the purport of the contract has been ascertained, the liability of the surety cannot be extended by implication or otherwise beyond the precise terms of his agreement.<sup>2</sup> In cases of doubt, the doubt is generally, if not universally, solved in his favor.<sup>3</sup> If the contract of the sureties is joint, the courts

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Bartlett v. Campbell, 1 Wend. 50; Hazard v. Nagle, 40 Penn. St. 178; Eagles v. Kern, 5 Whart. 144; Evans v. Commonwealth, 8 Watts, 398; Masser v. Strickland, 17 S. & R. 354; Webbs v. State, 4 Cold. (Tenn.) 199, 200; Atkins v. Baily, 9 Yerg. 111; Baylee v. Marsh, 1 Id. 460; Drummond v. Prestman, 12 Wheat. 515; McLaughlin v. Bank, 7 How. (U. S.) 220, 229; Inglehart v. State, 2 Gill & Johns. (Md.) 235, 245; Dane v. Gilmore, 51 Me. 544, 551, 555; Tracy v. Goodwin, 5 Allen, 409; Train v. Gold, 5 Pick. 380; Charles v. Haskins, 14 Iowa, 471; Lyons v. Northrop, 17 Id. 314; Duffield v. Scott, 3 T. R. 374; Jones' Adm'r's v. Williams, 10 L. J. (N. S.) Exch. 120, 123; State v. Woodside, 7 Ired. (N. C.) 296; McLin v. Hardie, 3 Id. 407; State v. Colerich, 3 Ohio, 487; Westerhaven v. Clive, 5 Id. 82.

<sup>1</sup> Code of Civil Pro. §§ 160, 161.

<sup>2</sup> Stull v. Hance, 62 Ill. 52; Getty v. Binsse, 49 N. Y. 385; Leggett v. Humphreys, 21 How. (U. S.) 66; Manufacturers' Bank v. Cole, 39 Me. 188; Bethune v. Dozier, 10 Ga. 235; McGoonney v. State, 20 Ohio, 93; Blair v. Perpetual Ins. Co. 10 Mo. 559; Ranay v. Baron, 1 Branch, 327; Field v. Rawlings, 1 Gillman, 581; Mix v. Singleton, 86 Ill. 194.

<sup>3</sup> Stull v. Hance, 62 Ill. 52.

cannot interpolate into it words of severalty, and thus transform it into a joint and several obligation.<sup>1</sup> They cannot be held further, or otherwise, than they have agreed.<sup>2</sup> No principle is better established than that a surety is not liable beyond the fair scope of his engagement; and that in contracts of suretyship, above all other contracts, the meaning of words and phrases is not to be extended to the prejudice of the surety, but that words shall be taken to have been used in their ordinary popular sense. In other words, the liability of sureties is always *strictissimi juris*, and shall not be extended by construction, so as to include transactions not within the manifest intention of the parties.<sup>3</sup> But sureties, like all other contracting parties, are bound by their contracts, and if their contracts are absolute, their obligations are absolute; and if their contracts are contingent, or subject to contingencies, they are so far favored, in law and equity, that they will be presumed to have been contracted with a view to whatever benefit or relief the contingent terms or law of the contract, or the happening of any contingent event may give them, unless the contrary is clearly made to appear.<sup>4</sup>

A general and indefinite suretyship has been held to extend to all the accessories of the principal obligation and even to the costs of suit.<sup>5</sup> But presumptions and

<sup>1</sup> Davis v. Van Buren, 72 N. Y. 587; Wood v. Fisk, 63 N. Y. 245.

<sup>2</sup> Palmer v. Foley, 71 N. Y. 106; Bigelow v. Benton, 14 Barb. 123; Walrath v. Thompson, 6 Hill, 540; Dobin v. Bradley, 17 Wend. 422; Hunt v. Smith, 17 Wend. 179; Wright v. Johnson, 8 Wend. 512.

<sup>3</sup> McCluskey v. Cromwell, 11 N. Y. 503; Walsh v. Bailie, 10 Johns. 181; United States v. Jones, 8 Peters, 399; United States v. Boyd, 15 Pet. 187; Miller v. Stewart, 9 Wheat. 702, 703; Strong v. Lyon, 63 N. Y. 172; Douglass v. Reynolds, 7 Peters, 113; People v. Chalmers, 60 N. Y. 154; People v. Pennock, 60 N. Y. 421; Western N. Y. Life Ins. Co. v. Clinton, 66 N. Y. 326; New Orleans Canal & Banking Co. v. Hagan, 1 La. Ann. 62.

<sup>4</sup> Olmsted v. Olmsted, 38 Conn. 309.

<sup>5</sup> Scully v. Hawkins, 14 La. Ann. 183; Benjamin v. Hillard, 23 How (U. S.) 149.

equities are never allowed to enlarge, or in any degree to change, their legal obligations.<sup>1</sup>

Contracts of guaranty, also, like contracts of suretyship, create no liability beyond what is already expressed in the terms employed as interpreted by the proper rules of construction.<sup>2</sup> If the guaranty is made with one person it cannot be extended to another,<sup>3</sup> nor can a guaranty of payment, to a specified amount, of certain specified parts of an entire contract, be extended to other parts of the same contract, even though the amount specified is sufficient to complete the entire contract.<sup>4</sup>

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<sup>1</sup> *Leggett v. Humphreys*, 21 How. (U. S.) 66.

<sup>2</sup> *Belloni v. Freeborn*, 63 N. Y. 383.

<sup>3</sup> *Barns v. Barrow*, 61 N. Y. 39; *Penoyer v. Watson*, 16 Johns. 100; *Walsh v. Bailie*, 10 Johns. 180; and see *ante*, p. 122.

<sup>4</sup> See *Melcher v. Fisk*, 69 N. Y. 607.

Where a person engages to guarantee the payment of the paper of another, made payable at a particular bank, he will not be liable on a note drawn by such party in which no place of payment is specified, though the note is deposited for collection in the bank specified in the guaranty, previous to its maturity, and notice thereof is given to the guarantor. *Dobbin v. Bradley*, 17 Wend. 422. In an old case, one Johnson, wishing to purchase goods from the plaintiff on credit, procured a letter of guaranty from the defendant containing the following clause: "Mr. Johnson thought it would be an accommodation to him to have you wait (for payment) until the first of January, 1840: if that will answer your purpose, I will be surety for the amount, to be paid at that time." The plaintiff sold Johnson the goods, but took his note for the goods payable on the 25th of December, 1839. Johnson was not called on to pay the note when due, and after January 1st, 1840, the plaintiff sued to enforce the guaranty. It was held, that inasmuch as the plaintiff had not agreed to wait for payment until the day proposed by the guaranty, the defendant was not liable. *Walrath v. Thomson*, 6 Hill, 540. In another case the defendant drew an order on the plaintiff, directing him to furnish goods out of his store to one Putnam, to the amount of seventy dollars, engaging to be accountable for such sum, and requesting the amount of the bill to be sent to him. The plaintiff furnished the goods to Putnam, to the amount of \$102 81, and took his note for thirty days. It was held, that the giving of credit discharged the guarantor from liability. *Hunt v. Smith*, 17 Wend. 179. In another case the defendant engaged to be accountable to any one who would advance to one Stickney any sum less than \$200, at nine or twelve months. Stickney delivered the guaranty to a creditor, in payment of a debt then due, for goods sold, amounting to \$102, and in consideration of the en-

A guaranty of the punctual payment of the interest upon a bond payable six years and six months from date, with interest semi-annually, extends only to the payment of interest falling due before the time of payment of the principal, and creates no liability for the payment of interest subsequently accruing.<sup>1</sup> A guaranty of an overdue obligation, which is silent as to the time of payment, does not create a liability to pay the debt at any particular time. The time of payment in such cases may be shown by extrinsic circumstances.<sup>2</sup> As a general rule, the liability of a guarantor is commensurate with that of his principal;<sup>3</sup> but in some States notice, of acceptance of the guaranty or of default of the principal debtor, is required to fix that liability, as has been already stated. In other cases the liability of the guarantor is made by the terms of his contract to depend on the failure to collect the debt guaranteed from the principal debtor by due course of law.

#### SECTION 8.—*When the principal is not liable.*

In the absence of fraud an undertaking which is binding on the principal is also binding upon the sureties

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gagement of the creditor to furnish him more goods, and to advance cash. These advances were subsequently made, so that the whole indebtedness of Stickney exceeded \$200. It was held, that the appropriation of the guaranty to the discharge of a prior debt, and the delivery of goods instead of money, were a departure from the terms of the guaranty, and that the guarantor was not liable. *Wright v. Johnson*, 8 Wend. 512.

<sup>1</sup> *Hamilton v. Van Rensselaer*, 43 N. Y. 244; *Melick v. Knox*, 44 N. Y. 576.

<sup>2</sup> *Donley v. Bush*, 44 Texas, 1.

<sup>3</sup> *Gage v. Lewis*, 68 Ill. 604. The liability of a guarantor will be considered as co-extensive with that of his principal, unless it is expressly limited; and if the guarantor becomes bound in general and indefinite terms, he makes himself liable for all the engagements of his principal resulting from the principal's contract. *Story on Cont.* § 866; 2 *Bouv. Inst.* 58; *Winchell v. Doty*, 15 Hun, 1.

in the undertaking;<sup>1</sup> and it is a general rule that the extent of the liability of the surety is commensurate with that of his principal,<sup>2</sup> unless he has expressly assumed a less or greater liability.<sup>3</sup>

But to this rule there are exceptions. If, by reason of some purely personal defense, the principal is not liable on his obligation, this will not release the surety. Thus, if the principal is an infant, or married woman, and incapable of executing a valid contract, a surety on such contract may be liable, though his principal is not.<sup>4</sup> But, on the other hand, if the principal's contract is contaminated by positive illegalities, and the principal has placed himself in such position that he cannot recede or compel a revocation, the agreement of the surety will not be binding, though the principal is bound.<sup>5</sup> And whenever the principal contract is void the surety will not be liable, though he believes it to be valid.<sup>6</sup>

A discharge in bankruptcy, also, may release the principal debtor without affecting the liability of his surety.<sup>7</sup> And this will be so though it is provided by statute that the "obligation of the surety is accessory to

<sup>1</sup> *Coleman v. Bean*, 3 Keyes (N. Y.), 94.

<sup>2</sup> *St. Albans Bank v. Dillon*, 30 Vt. 122; *Gage v. Lewis*, 68 Ill. 604; *Winchell v. Doty*, 15 Hun, 1; *Story on Cont.* § 866; 2 *Bouv. Inst.* 58.

<sup>3</sup> *Smith v. Rogers*, 14 Ind. 224. See cases last cited.

<sup>4</sup> *St. Albans Bank v. Dillon*, 30 Vt. 122; *Kimball v. Newell*, 7 Hill, 116; *Whitworth v. Carter*, 43 Miss. 61; *Stillwell v. Bertrand*, 22 Ark. 375; *Robinson v. Robinson*, 11 Bush (Ky.), 174; *Davis v. Statts*, 43 Ind. 103; S. C. 13 Am. R. 382; *Smiley v. Head*, 2 Rich. 590; *Harris v. Huntbach*, 1 Bur. 373; *Jones v. Crosthwaite*, 17 Iowa, 393; *Addison on Cont.* 37; *Chitty on Cont.* (10 Am. ed.) 547; 2 *Pars. on Cont.* 4; 1 *Pars. on Bills & Notes*, 244; *Foxworth v. Bullock*, 44 Miss. 457; *Unangst v. Fidler*, 84 Penn. St. 135; *Hicks v. Randolph*, 59 Tenn. 352.

<sup>5</sup> *Denison v. Gibson*, 24 Mich. 187.

<sup>6</sup> *Evans v. Huey*, 1 Bay, 13.

<sup>7</sup> *Claffin v. Cogan*, 48 N. H. 411; *Kane v. Ingraham*, 2 Johns. Cas. 403; *Jones v. Hagler*, 6 Jones Law (N. C.), 542; *Alsop v. Price*, 1 Douglas, 160; *Cowper v. Smith*, 4 Mees. & Wels. 519; *Garnett v. Roper*, 10 Ala. 842; *Moore v. Waller's Heirs*, 1 A. K. Marsh. (Ky) 488.



that of the principal, and if the latter from any cause becomes extinct, the former ceases, of course.”<sup>1</sup>

Sureties in a bond are not liable if the instrument is not executed by the person whose name is stated as the principal therein. Thus, if a bond, in which two partners are named as principals, is executed in the name of the firm by one partner only, without the assent of the other, for the purpose of obtaining a dissolution of an attachment against the partnership property, it will not be binding on the firm, and cannot be enforced against the sureties.<sup>2</sup> This principle has been applied where a bail bond, in a civil suit, was signed by the sureties only,<sup>3</sup> and to bonds for the jail limits,<sup>4</sup> or of a county treasurer, or of an administrator,<sup>5</sup> when similarly executed.

A surety cannot be held under a judgment void as against his principal.<sup>6</sup> A bond drawn in form to be signed by a principal and surety, and signed by the surety alone on the express condition that the principal's sig-

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<sup>1</sup> *Phillips v. Solomon*, 42 Ga. 192. In this case the court held that the statute was merely an affirmation of the common law, and that the words “from any cause,” meant any act or negligence of the creditor.

<sup>2</sup> *Russell v. Annable*, 109 Mass. 72; S. C. 12 Am. R. 665. See *Wild Cat Branch v. Ball*, 45 Ind. 213.

<sup>3</sup> *Bean v. Parker*, 17 Mass. 591.

<sup>4</sup> *Curtis v. Moss*, 2 Rob. (La.) 367.

<sup>5</sup> *People v. Hartley*, 21. Cal. 585. But see *State v. Bowman*, 10 Ohio, 445. It has been held, in Michigan, that a bond purporting to be executed by the principal, but not signed by him, and executed and delivered by a surety on the express stipulation that the principal was to join in it, is void. But the court declined to pass upon the question whether the mere absence of the name of the principal would render it invalid. See *Hall v. Parker*, 37 Mich. 590; S. C. 26 Am. R. 540. But in a later case the same court held that sureties are not liable on an official bond signed by them alone, and without their knowledge or consent accepted, without having the signature of their principal who was named upon its face as the primary debtor. And the court also held, that the burden of proving the consent of the sureties to its being so accepted is on those seeking to enforce it. *Johnson v. Kimball Township*.

<sup>6</sup> *McCloskey v. Wingfield*, 29 La. Ann. 141.

nature shall be obtained before the instrument is used, will not bind the surety until the condition is complied with.<sup>1</sup>

SECTION 9.—*Liability of sureties on official bonds, etc.*

The general rule, that the liability of a surety is measured by the terms of his contract, applies in its full force to contracts of suretyship entered into in the form of official bonds.

It is a clear proposition, on principle and authority, that the sureties on the bond of a public officer, are liable only for defaults committed by him after the commencement of the term of office for which they became his sureties; and that if it should so happen that the same individual had previously held the same office under a prior appointment, and had committed defaults during the term of that appointment, those who were his sureties on such prior appointment must be looked to for such defaults, and not those who signed his bonds on his re-appointment. Their engagement is for his future and not his past conduct; and it would be a gross imposition upon them, in the absence of a special stipulation to that effect, to impart into their undertaking responsibility for prior delinquencies.<sup>2</sup>

In case of an annual office the surety is presumed to contract for the faithfulness of his principal only for the year for which he was chosen, and perhaps for such

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<sup>1</sup> *Guild v. Thomas*, 54 Ala. 414; *Fales v. Filley*, 2 Mo. App. 345; *Cutter v. Roberts*, 7 Neb. 4.

<sup>2</sup> *Bissell v. Saxton*, 66 N. Y. 155; *Myers v. United States*, 1 McLean, 433; *Farrar v. United States*, 5 Pet. 372, 389; *United States v. Boyd*, 15 Id. 187; S. C. 5 How. (U. S.) 50; *Vivian v. Otis*, 24 Wis. 518; S. C. 1 Am. R. 199; *Postmaster General v. Nowell*, Gilpin, 106; *County of Mahaska v. Ingalls*, 16 Iowa, 81; *Bessinger v. Dickerson*, 20 Iowa, 261; *Inhabitants of Rochester v. Randall*, 105 Mass. 295; S. C. 7 Am. R. 519; *Jeffers v. Johnson*, 3 Harr. 382; *Thomson v. Macgregor*, N. Y. Ct. App. Nov. 1880.

further time as is reasonably sufficient for the election of his successor. For any misconduct of the principal after the expiration of that time the surety will not be liable.<sup>1</sup> If an officer is appointed for one year and until another is

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<sup>1</sup> *Supervisors of Omro v. Kaime*, 39 Wis. 468; *Mutual Loan & Building Association v. Price*, 16 Florida, 204; S. C. 26 Am. R. 703; *Chelmsford Company v. Demarest*, 7 Gray, 1; *Mayor, etc. of Rahway v. Crowell*, 11 Vroom (N. J.), 207; S. C. 29 Am. R. 224; *Dover v. Twombly*, 42 N. H. 59.

In the case of *Chelmsford Co. v. Demarest*, above cited, the defendant was a surety on a bond given by the treasurer of the plaintiff, conditioned that the principal during his continuance in said office should faithfully and punctually perform all the various duties incumbent on him in his office as treasurer, and should account, from time to time, for all moneys and funds of the plaintiff which might come into his hands as treasurer, and on his ceasing to hold the office should deliver over to the directors all funds, &c., then in his hands. The statute, under which he was chosen, provided that the treasurer should be chosen annually, and should hold his office until another was chosen and qualified in his stead. The treasurer made default after the expiration of the year. Chief Justice Shaw, in delivering the opinion of the court, says: "The court are of the opinion that under the direction of this law Phelps was elected as treasurer to an annual office; that the bond was a collateral security for the faithful performance of the duties of that office; and that such office being annual, such duties are limited to the term of a year; but in fixing it to one year we do not understand the statute to mean an exact calendar year or the number of days constituting an astronomical year. It is to be expounded according to the subject-matter, and, therefore, it must be construed to be for the official year of such corporation or body politic as holds annual meetings, the official year being the term ordinarily from one annual meeting to another. Nor do we think that the further provision above cited, 'shall hold their offices until others are chosen and qualified,' substantially changes the character of the office from an annual one to one for an indefinite time. \* \* \* The law having directed that such officer shall be chosen annually, or at the annual meeting, it assumes and pre-supposes that such direction will be complied with, and then the words in question must be construed to mean till the next annual meeting, or meeting at which such annual election is to be made, and such reasonable time afterwards as shall be sufficient to enable the officer elect to procure and deliver his bond, and do whatever else is required to complete his qualification; or, if he fails thus to qualify, until the corporation can elect another and cause him to be qualified."

The case of *Dover v. Twombly*, 42 N. H. 69, was a suit against a surety upon the bond of an annual officer, holding until qualification of his successor. The court sanctioned the doctrine of the Massachusetts case, and disposed of the suit against the surety accordingly. The same doctrine has been held in *Delaware; Mayor, etc. of Wilmington v. Horn* (2 Harr. 195); and

appointed in his stead, his sureties are liable for the first year only notwithstanding his re-appointment from year to year without further security.<sup>1</sup> If an officer is his own successor, and, prior to entering upon his second term and giving a new bond, reports that he has a certain sum of money in his hands, which report is made a matter of record, and at the end of the second term fails to account for the money as reported, his sureties on the new bond are liable for the defalcation.<sup>2</sup> But the general

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in Florida; *Mutual Loan & Building Association v. Price*, 16 Fla. 204. This, too, is the doctrine of the English cases. *Company of Proprietors, etc. v. Atkinson*, 6 East. 507; *Peppin v. Cooper*, 2 Barn. & Ald. 431.

<sup>1</sup> *Kingston Mutual Ins. Co. v. Clark*, 33 Barb. 196. See, also, *Welsh v. Seymour*, 28 Conn. 387; *South Carolina Society v. Johnson*, 1 McCord Law, 41; *Citizens' Loan Ass of Newark v. Nugent*, 11 Vroom, 215; S. C. 29 Am. R. 230. It has, however, been held that where the law provides that the officer shall hold his office until his successor shall qualify, the liability of the sureties continues until the successor has qualified. *Thompson v. State*, 37 Mis. 518. Where an officer, holding an annual office, gives a bond with a surety conditioned for his good behavior "during his continuance in office," the condition of the bond will be construed to refer to the actual duration of the office by virtue of the appointment under which the bond was taken; and the surety will not be liable beyond the term for which the officer was appointed, though the latter may act for a number of years thereafter without a new appointment, commission, or bond. *Commonwealth v. Fairfax*, 4 Hem. Manuf. 208; *Kingston Mut. Ins. Co. v. Clark*, 33 Barb. 196. And as to the liability of sureties in bonds of annual officers generally, see *Wardens of St. Saviors v. Bostock*, 5 Boss & Pul. 115; *Leadley v. Evans*, 9 Moore, 102; *Hassell v. Long*, 2 Maule & Sel. 363; *Bigelow v. Bridge*, 8 Mass. 275; *Biddell v. School District*, 15 Kansas, 168; *Commissioners v. Greenwood*, 1 Desaus. 450.

<sup>2</sup> *Morley v. Town of Metamora*, 78 Ill. 394; S. C. 20 Am. R. 266. This decision was put upon the ground that the new sureties upon the official bond of the officer must be held to have had notice of what appeared on the public records; that in contemplation of the law, the money mentioned in his report was in the hands of the officer, and the undertaking of the sureties on his bond was that he should account for it.

If, from all the facts in the case, it could be presumed that the sureties in the second bond of the officer contracted with reference to the money reported as in his hands, then this decision is not in opposition to the cases heretofore cited. In a late case in Massachusetts the facts were as follows: A person by the name of Darling, acting under an appointment as deputy sheriff,

rule is unquestioned, that the sureties for the fidelity of an officer, appointed or elected to an office of limited duration, are not liable beyond that period, nor are they liable for past defaults unless made so in terms.<sup>1</sup>

When a person has been duly elected to a public office, and has prepared his official bond, but neglects to

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attached and sold on a writ certain property belonging to one Grey. The suit was settled by the parties, but the deputy neglected to make return of the writ, and to pay the proceeds of the sale to Grey on demand. After demand had been made upon him, the deputy executed and delivered to the sheriff a bond with sureties conditioned that the deputy "shall well, punctually and faithfully discharge and perform all the services and duties incumbent on him as deputy sheriff," etc. The sheriff was compelled to pay Grey, and brought an action on the bond of his deputy to recover the sum he had been compelled to pay. In this action it was held, that the conversion by the deputy having occurred prior to the execution of the bond, the sureties were not liable. The court said: "The question in this case is, whether the facts which the evidence tends to establish show any misconduct or default in Darling, for which the defendant is liable on the bond in suit. And that depends upon the construction which must be given to the bond. There is nothing in the language of this contract which can be fairly construed to charge the defendant with any liability, except such as might arise from the future acts of the deputy. It does not appear, from any thing in the bond itself, that Darling had at that time transacted any business under the appointment referred to; nor was it shown that the sureties had knowledge, from other sources, that he had begun to act under it. The bond is in a form which the sheriff might properly have required when the deputy was first appointed. The words of the condition imply that it was intended to secure future good conduct only. See *Rochester v. Randall*, 105 Mass. 295, 297; *Franklin Bank v. Cooper*, 36 Me. 179, 192; *United States v. Boyd*, 15 Peters, 187; *United States v. Linn*, 1 How. 104; *Bruce v. United States*, 17 Id. 437. In the case at bar, the jury would be justified in finding, upon all the evidence, that Darling, by refusing to pay over the money to the party entitled to it, had fully converted the proceeds of the sale on the writ to his own use before the bond was executed; for any such conversion, his sureties would not be liable." *Thomas v. Blake*. Opinion by Colt, J., March Term, 1879.

<sup>1</sup> *Patterson v. Inhabitants of Freehold*, 38 N. J. Law, 255; *Paw-paw v. Eggleston*, 25 Mich. 36. As was said in *Farrar v. United States* (5 Peters, 373, 389), "if intended to cover past dereliction, the bond should have been made retrospective in its language."

file it until the statutory time has expired, and the office is thereupon declared vacant, the sureties in the bond will not be liable, although the same person is afterwards appointed to the same office and then files the bond. The sureties have the right to assume, on the occurrence of the vacancy, that they are no longer liable, even though their principal be afterwards appointed to fill the vacancy.<sup>1</sup> But the illegal cancellation of an official bond will not affect the liability of the sureties therein.<sup>2</sup>

If an officer, on entering upon his official duties, executes a bond in the proper form, and before the expiration of the term its length is increased by the legislature, the sureties will not be liable beyond the original term.<sup>3</sup> And, generally, sureties on an official bond will be liable only for such moneys as in point of fact, or in the judgment of the law, came into the hands of the principal before the expiration of the term of office covered by the bond.<sup>4</sup>

If the term of office is for two years, and until a successor is elected and qualifies, the sureties in the bond of the officer will not be liable for his misfeasance or non-feasance after the expiration of that time, although, having been re-elected, he holds over without qualifying.<sup>5</sup>

Where a bond is given after the commencement of the term, and, after reciting the period of the term, is conditioned that he shall faithfully account for and pay over all moneys received by him, his sureties will be liable for

<sup>1</sup> *Winneshick County v. Maynard*, 44 Iowa, 15.

<sup>2</sup> *Rochereau v. Jones*, 29 La. Ann. 82.

<sup>3</sup> *Brown v. Lattimore*, 17 Cal. 93; *The Queen v. Hall*, 1 Up. Can. C. P. R. 406; but see *Commonwealth v. Drewry*, 15 Gratt. 1.

<sup>4</sup> *Bryan v. United States*, 1 Black. (U. S.) 140.

<sup>5</sup> *Wapello v. Bigham*, 10 Iowa, 39. See *ante*, p. 152; *Munford v. Rice*, 6 Mumf. 81; *Rany v. The Governor*, 4 Blackf. (Ind.) 2; *Moss v. State*, 10 Mo. 338; *State v. Wayman*, 2 Gill. and Johns. 254.

all moneys received by the officer during his term, whether before or after the giving of the bond.<sup>1</sup>

A bond may be worded in such terms as to create a retrospective as well as a prospective liability, where but for such wording the instrument would not have such effect.

Where the appointee of an annual office gives a bond conditioned for the due accounting for all moneys he should receive, during the whole time of his continuing in said office in consequence of said appointment, or under any other or future election or appointment to said office, and the office is afterwards made to continue during the pleasure of the appointing power, the sureties will be liable for defaults occurring after the first year.<sup>2</sup>

If the office is not necessarily an annual office, but may continue for a longer time without giving new bonds, the sureties in a bond conditioned for the faithful performance of the duties of the office, during the period he should continue to act under the commission which might be granted to him, will bind the sureties during the time he continues to act, although he is commissioned for one year only.<sup>3</sup> So if a person is appointed to an office for a year, and gives a bond conditioned that during such time as he should continue in said office, by virtue of his appointment or any reappointment, he will use his best endeavors to collect, etc., the obligation of the bond will extend to all subsequent years in which such officer shall be continually re-appointed.<sup>4</sup>

Where a statute provides that an officer shall give a bond with sureties, and that the sureties shall be liable for the whole period the principal shall continue in office, if

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<sup>1</sup> Hatch v. Attleborough, 97 Mass. 533.

<sup>2</sup> Oswald v. Mayor of Berwick, 5 H. L. Cas. 856.

<sup>3</sup> Daly v. Commonwealth, 75 Penn. St. 331.

<sup>4</sup> Angero v. Keen, 1 Mees. and Wels. 390.

a bond is given conditioned for the proper performance of the duties of the office "during the whole time the principal shall or may continue in office," the sureties will be liable according to the terms of the statute and bond, although the officer holds a second term under a re-election, and although the bond recites the period for which the officer was originally elected.<sup>1</sup>

And generally, when the law makes an office a continuing one, and the parties had this in contemplation when the bond was executed, the liability on the bond is also a continuing liability.<sup>2</sup>

But generally speaking, an officer, upon re-election, should give a new bond, and his re-election will discharge the sureties on the bond given for the preceding term.<sup>3</sup> And if the bond given is not retrospective in its terms the sureties will not be liable thereunder for acts of their principal prior to its execution, although it was given in substitution for a prior bond which was canceled.<sup>4</sup>

The liability on an official bond attaches on its acceptance, or on its delivery for acceptance and approval, though not formally approved.<sup>5</sup> A defect in the approval of the bond will not affect the liability of the sureties therein,<sup>6</sup> nor will an error in the date, or an entire omission of a date, affect their liability.<sup>7</sup> The effect of omissions of this nature, or of other defects in the instrument, will be considered in another chapter.

The bond required by law from an officer, ought to

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<sup>1</sup> *Treasurers v. Lang*, 2 Bailey Law (S. C.), 430.

<sup>2</sup> *Amherst Bank v. Root*, 2 Met. 522.

<sup>3</sup> *People v. Aikenhead*, 5 Cal. 106.

<sup>4</sup> *Thompson v. Dickenson*, 22 Iowa, 360.

<sup>5</sup> *United States v. Le Baron*, 19 How. (U.S.) 73; *Green v. Wardwell*, 17 Ill. 278.

<sup>6</sup> *People v. Edwards*, 9 Cal. 286; *McCracken v. Todd*, 1 Kansas, 148.

<sup>7</sup> *Fournier v. Cyr*, 64 Me. 33.



embrace the duties devolving upon him, acting in a collateral or auxilliary function to his office. But, if the bond, prepared and executed by the surety and delivered, omits to bind the surety for these duties, and is with this omission accepted by the officer charged with its approval, the surety is not liable for any default of his principal in the duties omitted.<sup>1</sup>

The condition of a bond, that a supervisor of a town shall account for and pay over all moneys belonging to the town and coming into his hands "as supervisor," must be construed, and the liability of the sureties thereon limited, in reference to the statutes making the supervisor a custodian of public moneys. These statutes are a part of the contract of the surety ; and the sureties are liable only for moneys which their principal is authorized and bound by law to receive in his official capacity as disbursing agent for the town ; not for that of which he becomes the voluntary custodian, or which is ordered by the board of supervisors, without authority of law, to be paid to him.<sup>2</sup> So, where a public office is created without legislative authority, and the office filled by appointment, the sureties on the bond given by such officer, conditioned that he should faithfully pay and account for all moneys that should come into his hands as such officer, are liable to the extent that the officer acted within the limits of the power assumed to be conferred upon him, but not for acts done in excess of his authority.<sup>3</sup> The officer so appointed stands in the relation of a special agent of the board appointing him ; and the case comes within the ordinary transaction of a principal receiving security from his agent for the faithful discharge of the duties of his employment. A collector's

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<sup>1</sup> *United States v. Cheeseman*, 3 Sawyer, 424.

<sup>2</sup> *People v. Pennock*, 60 N. Y. 421.

<sup>3</sup> *Supervisors of Rensselaer v. Bates*, 17 N. Y. 242.

bond, conditioned for the faithful discharge of his duty as collector, although otherwise defective, is sufficient to hold him to pay over money actually collected, and which in equity belongs to the town;<sup>1</sup> and the sureties are bound, though he never took the oath of office;<sup>2</sup> and the fact that the bond was approved by an officer not authorized to give such approval, does not affect their liability.<sup>3</sup> The fact that funds collected by a public officer are stolen from him without his fault,<sup>4</sup> or have been actually consumed by fire without want of care or diligence on his part, or were lost by the failure of his depository, does not relieve him or his sureties from liability.<sup>5</sup> Nor is the liability of the sureties on an official bond affected by the fact that it was given in a case where no bond was required by statute.<sup>6</sup> A bond not good as a statutory bond, being voluntarily given, but not against the policy of the law, is good as a common law bond.<sup>7</sup> And the sureties are liable on a bond given by a public officer, voluntarily and without fraud or oppression, although the penalty of the bond is greater or smaller than the law prescribes.<sup>8</sup>

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<sup>1</sup> Prescott v. Moan, 50 Me. 347.

<sup>2</sup> Lyndon v. Miller, 36 Vt. 329; State v. Toomer, 7 Rich. (S. C.) 216.

<sup>3</sup> People v. Evans, 29 Cal. 429; Mendocino County v. Morris, 32 Cal. 145; Marshall v. Hamilton, 41 Miss. 229; Moore v. State, 9 Mo. 334.

<sup>4</sup> Morbeck v. State, 29 Ind. 86; United States v. Dashiell, 4 Wall. (U. S.) 182; Thompson v. Board of Trustees, 30 Ill. 99; Halbert v. State, 22 Ind. 125; Ohio v. Harper, 6 Ohio, N. S. 607; United States v. Prescott, 3 How. (U. S.) 578; Muzzy v. Shattuck, 1 Denio, 233.

<sup>5</sup> District Township of Union v. Smith, 39 Iowa, 9; S. C. 18 Am. R. 39; State v. Powell, 67 Mo. 935; S. C. 29 Am. R. 512.

<sup>6</sup> Williamson v. Woolf, 1 Ala. 296; Supervisors v. Coffenbury, 1 Mann. (Mich.) 355; Cross v. Gabeau, 1 Bailey, 211.

<sup>7</sup> Lane v. Kasey, 1 Met. (Ky.) 410. But see State v. Bartlett, 30 Miss. 624.

<sup>8</sup> Mathews v. Lee, 25 Miss. 417; McCaraher v. Commonwealth, 5 Watts & S. 21; Governor v. Matlock, 2 Hawks, 366; Johnson v. Gwathmey, 2 Bibb. 186; Stephens v. Treasurers, 2 McCord, 107; Treasurers v. Bates, 2 Bailey, 362.

A bond executed to the wrong person, natural or artificial, as to the State, instead of the county, is good as a common law bond, and may be enforced in the proper action.<sup>1</sup>

In respect to the acts constituting a breach of an official bond for which a surety will be held liable, it is obvious that no general rule can be given ; and that the liability, in a given case, will depend on the nature of the office, the duties required of the officer by statute, and the wording of the instrument itself.

The sureties in a bond given by a justice of the peace are bound only for the faithful performance of his ministerial duties, and are not liable for errors, mistakes and omissions of a judicial character.<sup>2</sup> On the same principle the sureties on a bond given by a teller in a bank, conditioned that he will well and faithfully perform the duties assigned to, and the trust reposed in him, are responsible for his honesty, but not for his ability ; they are not liable for his mistakes, but only for his breach of trust.<sup>3</sup>

Upon a bond conditioned for the faithful performance by a public officer of the duties of his office, the sureties are liable for the performance of all duties imposed on the officer which come fairly within the scope of his office, whether these duties were required by laws enacted before or after the execution of the bond,<sup>4</sup> unless the statute creating a new duty also provides for a special bond.<sup>5</sup> Thus, where a collector of customs executes a bond conditioned that he has truly executed and discharged, and should continue to execute and discharge

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<sup>1</sup> *State v. Thomas* 17 Mo. 503 ; *Lord v. Lancey*, 8 Shep. 468 ; *Branch v. Elliot*, 3 Dev. 86.

<sup>2</sup> *McGrew v. The Governor*, 19 Ala. 89.

<sup>3</sup> *Union Bank v. Clossey*, 10 Johns. 271.

<sup>4</sup> *Governor of Illinois v. Ridgway*, 12 Ill. 14 ; *Bartlett v. Governor*, 2 Bibb. 586.

<sup>5</sup> *State v. Bradshaw*, 10 Ired. 229.

all the duties of the office of collector according to law, the sureties on the bond will be liable for the performance of the duties first assumed by their principal, and which the bond was originally given to secure, even though duties have been added differing in their nature from those belonging to the office when the official bond was given.<sup>1</sup> But, if after an official bond is given, an act of the legislature impose new duties on the officer which are not germane to the office, the sureties on his bond will not be liable for the default of their principal, in the execution of the new duties imposed, in the absence of a clear provision of the bond to meet such a case.<sup>2</sup> The question is, whether the nature and functions of the office are changed? for if they are, it is not the same office within the meaning of the bond.<sup>3</sup>

Sureties on an official bond, conditioned for the faithful performance by an officer of his duties as such officer, are not liable for any acts not strictly constituting a part of the duties of such officer.<sup>4</sup>

The sureties on the official bond of a sheriff are liable

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<sup>1</sup> *Gansen v. United States*, 97 U. S. 584.

<sup>2</sup> This is illustrated by the case of *White v. City of East Saginaw*, decided in the Supreme Court of Michigan, June, 1880. After the official bond of a sheriff had been given, an act of the legislature taxing the business of manufacturing and selling intoxicating liquors was passed, and sheriffs were required to collect the tax when warrants therefor were issued by the county treasurers. The court held that the duty of collecting taxes was not germane to the office of sheriff, and that the sureties on his bond would not be liable for his default therein, in the absence of a clear provision of the bond covering such a case. See also *People v. Edwards*, 9 Cal. 286.

<sup>3</sup> *Phybus v. Gibbs*, 6 E. & B. 88 Eng. C. L. 88. See, also, *Oswald v. Mayor of Berwick*, 26 E., L. & E. 85; *Skillett v. Fletcher*, L. R. 2 C. & P. 469; *St. Louis v. Sickles*, 52 Mo. 122; *Amherst Bank v. Root*, 2 Metc. 536; *Commonwealth v. Holmes*, 25 Gratt. 771; *Kitson v. Julian*, 30 E., L. & E. 326; *Manufacturers National Bank of Newark v. Dickerson*, 12 Vroom, 448; S. C. 32 Am. R. 237.

<sup>4</sup> *State of Ohio v. Medary*, 17 Ohio, 554; *Eaton v. Kelly*, 72 N. C. 110; *Collier v. Stoddard*, 19 Ga. 274.

for a breach of duty on the part of their principal in the execution of a deed of trust;<sup>1</sup> for his misconduct in the discharge of his duties as public administrator;<sup>2</sup> for his misconduct as syndic of an insolvent estate;<sup>3</sup> for his default in paying over moneys received by him as collector of taxes, when the collection of taxes is a part of his official duty;<sup>4</sup> for collecting an assessment of taxes on property not subject to taxation,<sup>5</sup> but not for his default as collector of taxes which he had no right to collect until he had executed other bonds;<sup>6</sup> for his failure to levy an execution which he had the power to levy;<sup>7</sup> or to sell under it;<sup>8</sup> or to return it within the time prescribed;<sup>9</sup> but not for the penalties prescribed by statute for the failure to return an execution,<sup>10</sup> nor for his illegal acts in the service of an execution, under the direction of the plaintiff therein;<sup>11</sup> for permitting the defendant in the execution to remove property levied on, resulting in the loss of the plaintiff's demand;<sup>12</sup> for compelling over-payment on an execution, by a threat to levy if the sum demanded is not paid;<sup>13</sup> but not for his refusal to repay, on demand, money received in excess of the execution through a mutual

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<sup>1</sup> *State v. Griffith*, 63 Mo. 545.

<sup>2</sup> *State v. Watts*, 23 Ark. 304.

<sup>3</sup> *Succession of David*, 14 La. Ann. 730.

<sup>4</sup> *State v. Kelley*, 43 Texas, 667; *State v. Powell*, 44 Mo. 436; *Taylor v. Nunn*, 2 Met. (Ky.) 199; *People v. Edwards*, 9 Cal. 286.

<sup>5</sup> *State v. Shacklett*, 37 Mo. 280.

<sup>6</sup> *Anderson v. Thompson*, 10 Bush. (Ky.) 132.

<sup>7</sup> *O'Bannon v. Saunders*, 24 Gratt. (Va.) 138; *Shannon v. Commonwealth*, 8 S. & R. 444.

<sup>8</sup> *Buckley v. Hampton*, 1 Ired. 318.

<sup>9</sup> *Roth v. Duvall*, 1 Idaho T. 167; *Governor v. Pleasants*, 4 Pike, 193.

<sup>10</sup> *Treasurers v. Hilliard*, 8 Rich. (S. C.) 412; *M'Dowell v. Burwell*, 4 Rand. 317; *Fletcher v. Chapman*, 2 Leigh, 565.

<sup>11</sup> *Rollins v. State*, 13 Mo. 437.

<sup>12</sup> *Commonwealth v. Hurt*, 4 Bush. (Ky.) 64; *Fisher v. Vanmeter*, 9 Leigh, 18.

<sup>13</sup> *Snell v. State*, 43 Ind. 359; *Treasurers v. Buckner*, 2 M'Mullan, 327.

mistake ;<sup>1</sup> nor for depreciated funds received by the sheriff on the execution, and not returned to the defendant after the refusal of the plaintiff to accept them ;<sup>2</sup> nor for moneys collected without execution, or on an execution *functus officio* ;<sup>3</sup> nor for his acts or omissions in the service of a precept which, by law, he was not authorized to serve,<sup>4</sup> nor for moneys retained by him by consent of the execution creditor.<sup>5</sup> But they are liable for the surplus remaining in his hand after the satisfaction of all legal demands under the writ ;<sup>6</sup> for moneys collected under color of office, although the writ was erroneous or illegal ;<sup>7</sup> for his failure to respond to his statutory liability as bail ;<sup>8</sup> for an escape ;<sup>9</sup> for illegally and fraudulently conducting a sale on execution so that the property of the execution debtor is sacrificed ;<sup>10</sup> for tortious acts done under color of office ;<sup>11</sup> but not for acts of violence which are personal wrongs,<sup>12</sup> nor for his strictly personal dealings with the parties to the execution ;<sup>13</sup> for his trespass in taking the goods of one person under an attachment or execution

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<sup>1</sup> State v. Ireland, 68 N. C. 300.

<sup>2</sup> Brown v. Mosely, 11 S. & M. 354.

<sup>3</sup> Turner v. Collins, 4 Heisk. (Tenn.) 89 ; Thomas v. Bowder, 33 Texas, 783 ; Mills v. Allen, 7 Jones Law (N. C.), 564 ; Governor v. Perrine, 23 Ala. 807 ; Dean v. Governor, 13 Ala. 526.

<sup>4</sup> Dane v. Gilmore, 51 Me. 544.

<sup>5</sup> Hill v. Kemble, 9 Cal. 71.

<sup>6</sup> State v. Clymer, 3 Houst. (Del.) 20 ; State v. Reed, 5 Ired. 357. See State v. Poole, 5 Ired. 105.

<sup>7</sup> Rollins v. State, 13 Mo. 437.

<sup>8</sup> People v. Dikeman, 3 Abb. (N. Y.) App. Dec. 520 ; Evans v. Blalock, 2 Jones Law (N. C.), 377.

<sup>9</sup> State v. Johnson, 1 Smith, 37.

<sup>10</sup> Grimes v. Gresham, 1 Smith, 94.

<sup>11</sup> Jewell v. Mills, 3 Bush. (Ky.) 62.

<sup>12</sup> Id ; State v. Brown, 11 Ind. 141.

<sup>13</sup> Schloss v. White, 16 Cal. 65 ; Hill v. Kemble, 9 Cal. 71 ; People v. Edwards, 9 Cal. 286.

against another;<sup>1</sup> for moneys received during his term of office, but not due or demanded until after the expiration of his term, or properly paid to him as sheriff after he is out of office;<sup>2</sup> for securities received in his official capacity as the proceeds of a sale on partition, and not delivered to the proper parties in accordance with an order of the Court;<sup>3</sup> but not for the printer's bills in advertising such sales,<sup>4</sup> nor for moneys intrusted to him which should have been intrusted to a different officer;<sup>5</sup> nor for any other malfeasance not amounting to an omission to perform some duty imposed by law,<sup>6</sup> or a breach of an official duty.<sup>7</sup>

His sureties are liable, also, for the default of a special deputy,<sup>8</sup> and for a false return.<sup>9</sup>

A distinction is taken by the authorities between an act done *color officii* and one done *virtute officii*.<sup>10</sup> Acts are done *virtute officii* when they are within the authority of the officer, but in doing them he exercises that authority improperly, or abuses the confidence which the law reposes in him; while acts are done *colore officii* where they are of such a nature that his office gives him no authority to do them. It has been held that the sureties

<sup>1</sup> Sangster v. Commonwealth, 17 Gratt. (Va.) 124; Holliman v. Carroll's Adm'rs. 27 Texas, 23; Charles v. Haskins, 11 Iowa, 329; Van Pelt v. Littler, 14 Cal. 194; People v. Schuyler, 4 N. Y. 173; Cumming v. Brown, 43 N. Y. 514; Dennison v. Plumb, 18 Barb. 89. But see State v. Conover, 4 Dutch. (N. J.) 224.

<sup>2</sup> King v. Nichols, 16 Ohio St. 80; Elkin v. People, 3 Scam. 207.

<sup>3</sup> Brobst v. Skillen, 16 Ohio St. 382; Griffin v. Underwood, 16 Ohio St. 389; Black v. Ramey, 4 Strobb., 79.

<sup>4</sup> Commonwealth v. Swope, 45 Penn. St. 535; Allen v. Ramey, 4 Strobb., 30.

<sup>5</sup> Sample v. Davis, 4 Green (Iowa), 117.

<sup>6</sup> Governor v. Hancock, 2 Ala. 728. But see Skinner v. Phillips, 4 Mass. 69.

<sup>7</sup> Collier v. Stoddard, 19 Ga. 274.

<sup>8</sup> Todd v. Jackson, 3 Humph., 398.

<sup>9</sup> Ex parte Chester, 5 Hill, 555.

<sup>10</sup> See note to Coupey v. Henley, 2 Exp. 540; Seeley v. Birdsall, 15 Johns. 267; Morris v. Van Voast, 19 Wend. 228.

on an official bond are liable only for acts done *virtute officii*.<sup>1</sup>

The sureties on the official bond of a constable are liable for his tortious acts done under color of his office,<sup>2</sup> but not for his acts of violence which are personal wrongs,<sup>3</sup> nor for any act done by him as a mere agent and not in his official capacity.<sup>4</sup> If he has authority to execute the process of the court having original jurisdiction of the amount of the debt to be collected, the sureties on his bond are liable for the amount when collected by him;<sup>5</sup> but if he collects and retains a sum not within the jurisdiction of the inferior courts, his sureties are not liable.<sup>6</sup> If he has collected money under a writ from a court of competent jurisdiction, his sureties are liable if he withholds the money so collected, notwithstanding any error or irregularity in the judgment or in the previous proceedings;<sup>7</sup> and if he turn over the proceeds of attached property to a third party on mere notice of claim without proof of title, his sureties are liable.<sup>8</sup> So they are liable for his failure to return an execution as required by law,<sup>9</sup> or for a levy and sale of property without authority of law;<sup>10</sup> or for the attachment on *mesne* process of the prop-

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<sup>1</sup> Gerber *v.* Ackley, 37 Wis. 43; S. C. 19 Am. R. 751. But see Rollins *v.* State, 13 Mo. 437; Jewell *v.* Mills, 3 Bush. (Ky.) 62. A deputy sheriff and his sureties are liable to the sheriff for acts done *colore officii*, as well as for those done *virtute officii*. Lucas *v.* Locke, 11 W. Va. 81.

<sup>2</sup> Jewell *v.* Mills, 3 Bush. (Ky.) 62.

<sup>3</sup> Jewell *v.* Mills, 3 Bush. (Ky.) 62.

<sup>4</sup> Commonwealth *v.* Sommers, 3 Bush. (Ky.) 555; Crittenden *v.* Terrill, 2 Head (Tenn.), 588.

<sup>5</sup> Commonwealth *v.* Peters, 4 Bush. (Ky.) 403.

<sup>6</sup> Commonwealth *v.* Sommers, 3 Bush. (Ky.) 555.

<sup>7</sup> Nutzenholster *v.* State, 37 Ind. 457.

<sup>8</sup> State *v.* Langdon, 57 Mo. 353.

<sup>9</sup> Alexander *v.* Eberhardt, 35 Mo. 475; Bennett *v.* Vinyard, 34 Mo. 216; Carpenter *v.* Doody, 1 Hilton (N. Y. C. P.) 465, Rowland *v.* Wood, 4 Dana, 194; Sloan *v.* Case, 10 Wend. 370.

<sup>10</sup> Strunk *v.* Ocheltree, 11 Iowa, 329.



erty of one not the defendant;<sup>1</sup> or for his failure to levy an execution on the goods and chattels of a judgment-debtor subject to execution;<sup>2</sup> or for the taking of the property of a third person under execution instead of the property of the defendant;<sup>3</sup> or for the delinquencies of one acting as deputy with his consent, though his appointment is not filed as required by law;<sup>4</sup> or for a levy on exempt property;<sup>5</sup> for failure to pay over the proceeds of the sales of property levied on before, but sold after the return day of the writ;<sup>6</sup> but not for moneys collected by him after he has resigned his office;<sup>7</sup> nor for moneys entrusted to him by the defendant to pay to the plaintiff in a writ after the completion of the service;<sup>8</sup> nor for money collected without process.<sup>9</sup>

The sureties on the bond of a county clerk are liable for the act of the clerk in drawing extra salary without authority;<sup>10</sup> for a neglect to issue notice to a guardian to renew his bonds whereby the ward suffers loss;<sup>11</sup> for issuing a writ of error and a supersedeas without taking the proper bond;<sup>12</sup> but not for not taking a good and sufficient appeal bond, that being no part of his duty.<sup>13</sup>

Sureties on the bond of a teller in a bank, conditioned for the faithful conduct of their principal, are liable in a

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<sup>1</sup> *Greenfield v. Wilson*, 13 Gray (Mass.), 384.

<sup>2</sup> *State v. Druly*, 3 Ind. 431; *Lawton v. Erwin*, 9 Wend. 233; *Commonwealth v. Cull*, 7 J. J. Marsh. 149.

<sup>3</sup> *Ohio v. Jennings*, 4 Ohio (N. S.), 418; *Brunott v. M'Kee*, 6 Watts & S. 513; *Archer v. Noble*, 3 Greenl. 418.

<sup>4</sup> *State v. Muir*, 20 Mo. 303.

<sup>5</sup> *State v. Farmer*, 21 Mo. 160.

<sup>6</sup> *Dennis v. Chapman*, 19 Ala. 29.

<sup>7</sup> *Atkins v. Baily*, 9 Yerg. 111.

<sup>8</sup> *Boston v. Moore*, 3 Allen (Mass.) 126.

<sup>9</sup> *Henckler v. County Court*, 27 Ill. 39.

<sup>10</sup> *People v. Treadway*, 17 Mich. 480.

<sup>11</sup> *State v. Watson*, 7 Ired. 289.

<sup>12</sup> *McNutt v. Livingston*, 7 S. & M. 641.

<sup>13</sup> *M'Allister v. Scrice*, 7 Yerg. 277.

nominal sum for a falsification of his accounts made, after the execution of the bond, to conceal a misapplication or embezzlement of moneys before the execution of the bond, but not for the moneys misapplied.<sup>1</sup> And the sureties on the bond of a county treasurer are liable for the balance found to be due, on the settlement of his accounts by the county auditors, whether or not the money was raised by the county officials in excess of their authority, if, in fact, it came into the county treasury.<sup>2</sup> But they are not liable for moneys coming into his hands by voluntary contributions for a specific purpose, even though he has included the receipts and disbursements of such moneys in his official accounts.<sup>3</sup>

So they are liable for his omission to cancel county warrants paid by him, and afterwards stolen and put into circulation without fault on his part.<sup>4</sup> And the felonious taking and carrying away of public moneys in the custody of the county treasurer, does not discharge him or his sureties, as his responsibility depends on his contract and not on the law of bailment.<sup>5</sup>

A surety on the bond of a justice of the peace is only bound that his principal shall faithfully discharge his duties as justice, and is not liable for acts which that officer could not legally do as justice, and which are beyond his jurisdiction.<sup>6</sup>

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<sup>1</sup> *State v. Atherton*, 40 Mo. 209. See *Wayne v. Commercial, &c. Bank*, 52 Penn. St. 343.

<sup>2</sup> *Boehmer v. Schuylkill*, 46 Penn. St. 452; *Wylie v. Gallagher*, 46 Penn. St. 205; *Bullwinkel v. Guttenberg*, 17 Wis. 583; *Mahaska v. Ingalls*, 14 Iowa, 170.

<sup>3</sup> *Hatch v. Attleborough*, 97 Mass. 533.

<sup>4</sup> *Johnson v. Hughes*, 12 Iowa, 495. But see *Chance v. Temple*, 1 Clarke (Iowa), 179.

<sup>5</sup> *Ohio v. Harper*, 6 Ohio (N. S.), 607.

<sup>6</sup> *Doepfner v. State*, 36 Ind. 111. A bond of a justice of the peace was conditioned for the payment on demand to every person entitled thereto, "of all such sums of money as the justice might become liable to pay on account

But his sureties are liable if the justice, in his official capacity, receives a note for collection, and, after collecting it, appropriates the proceeds to his own use;<sup>1</sup> and they are also liable to the owner of a judgment rendered by the justice and entered upon his docket for moneys paid to, and collected by, the justice, which he afterwards refuses to pay over,<sup>2</sup> and for moneys collected by him in his official capacity without suit;<sup>3</sup> but not for moneys collected as a mere agent without suit,<sup>4</sup> nor for moneys paid into his hands before due.<sup>5</sup> So far as the liability of the sureties is concerned, the bond of a justice *de facto* is as binding as a bond of a justice *de jure*.<sup>6</sup>

The sureties on the bond of a person specially deputized by a sheriff to collect taxes, who continues to collect after the resignation of the sheriff, and fails to make due return, are liable to the sheriff for the amount of the unreturned taxes the sheriff is compelled to pay.<sup>7</sup> And where the statute makes it the duty of the county treasurer to charge to the collector the sums to be collected by him on the warrant, the sureties on the collector's bond will be liable for the full amount of the uncollected taxes, notwithstanding the warrant was not delivered to the collector in time to admit of his enforce-

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of moneys which might come into his hands *by virtue of his office*." The justice failed to pay, on demand, the proceeds of an execution sale of notes seized on attachment in suits before him, the judgments in those suits being void. It was held, in an action on his bond to recover the moneys received by him on such sales, that such moneys having come into his hands by a *trespass*, and not "by virtue of his office," the sureties on his bond were not liable. *Barnes v. Whitaker*, 45 Wis. 204; following *Taylor v. Parker*, 43 Wis. 78.

<sup>1</sup> *Widener v. State*, 45 Ired. 244; *Bessenger v. Dickerson* 20 Iowa, 260; *Latham v. Brown*, 16 Iowa, 118.

<sup>2</sup> *Brockett v. Martin*, 11 Kansas, 377.

<sup>3</sup> *Ditmars v. Commonwealth*, 47 Penn. St. 335.

<sup>4</sup> *Commonwealth v. Kendig*, 2 Barr. 448.

<sup>5</sup> *Stevens v. Breatheven*, Wright, 733.

<sup>6</sup> *Green v. Wardwell*, 17 Ill. 278.

<sup>7</sup> *Perry v. Campbell*, 63 N. C. 257.

ing collection by legal process, unless positive proof be given that the amount was not actually received.<sup>1</sup> The sureties on a county collector's bond are liable for the full amount of the penalties imposed by law upon their principal for his defalcations ;<sup>2</sup> and if the same person is collector for two or more successive years, and his sureties on his official bond are not the same in each year, it is for the defendants, in a suit on one of the bonds, to show in which year the defalcations occurred ;<sup>3</sup> and the sureties on his bond for any one year will be liable for his application of the taxes of that year to the payment of taxes collected the previous years, and for which he was in arrears, when no other officer is chargeable with any fault in making such application ;<sup>4</sup> and if the collector has settled his account with the proper officer, without objection to the application which he had made of payments to the earliest items of the collector's indebtedness, the sureties will be bound by this application of payments.<sup>5</sup> But it has been held, that where a collector fails to account for a portion of the taxes committed to him the first year, moneys received from taxes collected in subsequent years cannot be appropriated to make up the deficiency of the first year, so as to affect the relative rights and liabilities of the sureties of his several bonds, without the consent of the sureties ; and that a settlement made with the collector by the proper authorities, in which such appropriation is

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<sup>1</sup> *Fake v. Whipple*, 39 N. Y. 394; *Bradley v. Ward*, 58 N. Y. 401.

<sup>2</sup> *Christian v. Ashley County*, 24 Ark. 142.

<sup>3</sup> *Readfield v. Shaver*, 50 Me. 36.

<sup>4</sup> *Lyndon v. Miller*, 36 Vt. 329; *State v. Sooy*, 39 N. J. L. 539.

<sup>5</sup> *State v. Smith*, 32 Mo. 524. The apportionment of the amounts due upon several successive official bonds, which have been indorsed on the bonds and signed by the sureties, will be held conclusive upon them, except on clear proof of fraud or mistake of fact. *Pickering v. Day*, 2 Del. Ch. 333.

sought to be made, does not bind either the sureties or these for whom the collector is acting.<sup>1</sup>

The fact that the money collected was stolen from the collector, without his fault, is no defense to an action on the bond,<sup>2</sup> and defects in the warrant or tax list are not available to the sureties as a defense to an action on the bond for moneys collected by their principal as taxes and not paid over,<sup>3</sup> although it is held that the collector is not responsible for not collecting taxes under a warrant illegal upon its face;<sup>4</sup> and that he cannot be regarded as in fault, and made liable on his bond for not collecting, when he cannot legally enforce the payment of taxes, by reason of the absence of any power to distrain or commit in the warrant given him by the assessors.<sup>5</sup> And, generally, the sureties on a collector's bond cannot be made liable for the failure of the collector to collect when no tax list has been furnished him, authenticated as required by statute; but they are liable for so much as has been collected whether the tax list is properly authenticated or not.<sup>6</sup>

The sureties on the official bond of a collector of customs are liable for the faithful application, by him, of moneys of the United States received by him from his predecessor in office.<sup>7</sup>

The enactment of general statutes by which the duties of a collector are varied will affect the liability of the sureties, if such changes are not to their prejudice.<sup>8</sup>

<sup>1</sup> *Porter v. Stanley*, 47 Me. 515.

<sup>2</sup> *Hancock v. Hazzard*, 12 Cush. (Mass.) 112.

<sup>3</sup> *Orono v. Wedgewood*, 44 Me. 49.

<sup>4</sup> *Cheshier v. Howland*, 13 Gray (Mass.), 321.

<sup>5</sup> *Frankfort v. White*, 41 Me. 537.

<sup>6</sup> *Governor v. Montgomery*, 2 Swan (Tenn.), 613.

<sup>7</sup> *Broome v. United States*, 15 How. (U. S.) 143.

<sup>8</sup> *Compher v. People*, 12 Ill. 290; *Borden v. Houston*, 2 Texas, 594; *State v. Carleton*, 1 Gill. 249; *Governor of Illinois v. Ridgway*, 12 Ill. 14.

The sureties in the official bond of a cashier of a bank, conditioned that he will well and truly perform the duties of a cashier to the best of his ability, not only undertake for the fidelity and honesty of their principal but also that he shall perform the duties of cashier with competent skill and ability; and if he transcends the known powers of the cashier, by changing the securities of the bank without their knowledge, and loss accrues by the abuse of his trust, the sureties are answerable for the loss.<sup>1</sup>

So the sureties in the bond of an assistant book-keeper of a bank, conditioned for the faithful discharge of the trust reposed in him as assistant book-keeper, engage that he will not avail himself of his position to misapply or embezzle the funds of his employer, and are liable for his appropriation of the money of the bank and the making of fraudulent entries in the journal to avoid detection, although the embezzlement was committed while keeping a journal usually kept by the teller.<sup>2</sup> But where an assistant clerk in a bank, who has given a bond with sureties for the faithful performance of the duties of assistant clerk, is promoted, without the knowledge of his sureties, to the position of book-keeper, and from his position and proximity to the money-drawer is enabled to abstract money from time to time and make false entries to conceal his crime, his sureties will not be liable for such embezzlement.<sup>3</sup> On the other hand, where a bank messenger has given a bond, conditioned that he should account for and pay over all moneys that might come into or pass through his hands as such messenger, and that he should in all things conduct himself honestly and

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<sup>1</sup> *Barrington v. Bank of Washington*, 14 Serg. & R. 405. But see *Union Bank v. Clossey*, 10 Johns. 271.

<sup>2</sup> *Rochester City Bank v. Elwood*, 21 N. Y. 88.

<sup>3</sup> *Manufacturers' National Bank of Newark v. Dickerson*, 12 Vroom (N. J.), 448; S. C. 32 Am. R. 237; *Northwestern Nat. Bank of Minneapolis v. Keen*, 37 Leg. Int. 124.

faithfully as messenger, his sureties will be liable for moneys stolen by him from the safe and vault of the bank, through the means of keys and a knowledge of the combination intrusted to him by officers of the bank.<sup>1</sup>

SECTION 10.—*Liability on bonds and undertakings given in judicial proceedings.*

The liability of a surety in a statutory obligation is measured by the contract as it is, and not by what the legislature intended that it should be; and the language of the instrument must be construed as if it had been used in any other instrument; and the fact that the obligation was given in pursuance of a statute, does not alter its plain import, or affect the liability thereunder.<sup>2</sup> There are certain peculiarities in this class of obligations that should not pass unnoticed. A statutory obligation is not within the statute of frauds, and no consideration need be stated in it, or alleged or proven to sustain it.<sup>3</sup> If the obligation substantially complies with the requirements of the statute, it will be sufficient, and slight variations and departures from the statute will not be deemed fatal.<sup>4</sup> If the statute requires two sureties, but does not declare it void if signed by a less number, it will be binding on the

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<sup>1</sup> *German American Bank v. Auth*, 87 Penn. St. 419; S. C. 30 Am. R. 374. Cases might be cited to an almost unlimited number in which the existence and extent of the liability of sureties in official bonds have been discussed and determined. But as the powers and duties of public officers in the several States are regulated by constitutional and statutory provisions in a certain sense peculiar to each State, and as the liability of the surety depends on a breach of official duty as the same is declared in such provisions, and on the peculiar wording of the bond itself, no advantage can be gained by a multiplication of citations and decisions.

<sup>2</sup> *Wood v. Fisk*, 63 N. Y. 245; *Davis v. Van Buren*, 72 N. Y. 587.

<sup>3</sup> *Bildersee v. Aden*, 62 Barb. 175; *Thomson v. Blanchard*, 3 N. Y. 335; *Doolittle v. Dininny* 31 N. Y. 350.

<sup>4</sup> *Kelly v. McCormick*, 28 N. Y. 318. Code of Civil Pro. (N. Y.) § 729.

one executing it.<sup>1</sup> If taken and approved by an officer in an action in which he had no jurisdiction, it will be wholly void.<sup>2</sup> The sureties on an undertaking given to procure the discharge of an attachment which is void for want of jurisdiction of the subject-matter, cannot be held liable on their obligation, as the whole proceeding is a nullity, and the undertaking is of no effect whatever.<sup>3</sup> But mere irregularities may be waived, and the sureties estopped from questioning their liability on their undertaking.<sup>4</sup> This disability is not confined to the proceedings in the court in which the attachment suit is brought, but extends to all proceedings necessary to enable the defendant to release his property from the levy.<sup>5</sup>

The sureties in an undertaking given on an appeal from the Special to the General Term of the Court of Common Pleas, conditioned that the appellant will pay "all costs and damages which may be awarded against him on said appeal," are not liable for the costs of an appeal by their principal to the Court of Appeals from a judgment of affirmance of the General Term.<sup>6</sup> But the sureties in an undertaking given on an appeal from the Special to the General Term, conditioned that if the judgment should be affirmed the appellant would pay the amount thereof, are liable, on an appeal to the Court of Appeals, when the judgment of the Special Term is reversed at the General Term but affirmed in the Court of Appeals.<sup>7</sup> So, where a party, on appealing to the

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<sup>1</sup> *People v. Johr*, 22 Mich. 461; *Shaw v. Tobias*, 3 N. Y. 188. New York Code of Civil Pro. § 811.

<sup>2</sup> See *Caffrey v. Dudgeon*, 33 Ind. 512; *Hicks v. Mendenhall*, 17 Minn. 475.

<sup>3</sup> *Coleman v. Bean*, 32 How. 370; S. C. 3 Keyes, 94; *Cadwell v. Colgate*, 7 Barb. 253; *Homan v. Brinkerhoff*, 1 Denio, 184.

<sup>4</sup> *Id.* *Bostwick v. Goetzel*, 57 N. Y. 582.

<sup>5</sup> *Bennett v. Brown*, 20 N. Y. 99; *Ball v. Gardiner*, 21 Wend. 270.

<sup>6</sup> *Hinckley v. Kreitz*, 58 N. Y. 583.

<sup>7</sup> *Robinson v. Plimpton*, 25 N. Y. 484.



County Court from a judgment of a justice of the peace, executes an undertaking with sureties, conditioned that if judgment shall be rendered against the appellant and execution thereon be returned unsatisfied in whole or in part, the obligors will pay the amount unsatisfied, and the County Court reverses the judgment of the justice, and on appeal to the Supreme Court the General Term reverses the judgment of the County Court and affirms that of the justice with costs, the sureties are liable not merely for the amount of the judgment in the County Court but for the amount recovered in the Supreme Court.<sup>1</sup>

In such cases the judgment which the surety undertakes to pay, and for which he is liable, is the one finally rendered against the appellant on the appeal.<sup>2</sup> And so, where an undertaking given by the plaintiff upon the commencement of an action in justice court for the recovery of the possession of personal property, is conditioned for the prosecution of said action, and the return of said property to the defendant, if a return thereof be adjudged, and for the payment to the defendant of such sum as may for any cause be recovered against said plaintiff, the liability of the surety will extend to all proceedings and adjudications in the same action, through every court to which it may be carried by appeal, in case the plaintiff is finally defeated.<sup>3</sup> And generally, where a bond is given in a subordinate court to prosecute an appeal to effect in a superior court, the sureties become liable if the judgment is affirmed in the superior court; nor are they discharged in case the judgment of the superior court is removed into a higher court for re-examination and a new bond is

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<sup>1</sup> *Smith v. Crouse*, 24 Barb. 433.

<sup>2</sup> *Humerton v. Hay*, 65 N. Y. 380; *Gardner v. Barney*, 24 How. 467; *Doolittle v. Dininny*, 31 N. Y. 350.

<sup>3</sup> *Letson v. Dodge*, 61 Barb. 125; *Tibbles v. O'Connor*, 28 Barb. 538; *Traver v. Nichols*, 7 Wend. 434.

given to prosecute the second appeal, if the judgment is affirmed in the court of last resort. Nothing will discharge the sureties given to prosecute the appeal from the court of original jurisdiction, but the reversal of the judgment in the same court having jurisdiction to correct the alleged error.<sup>1</sup>

As the liability of a surety is on his contract he cannot be held beyond its terms. Thus, a surety on an attachment bond cannot be held liable as a trespasser for the seizure of property attached by the sheriff, even if the bond is void.<sup>2</sup> A change in a statute under which an undertaking has previously been given cannot vary the liability of the surety or impose an obligation where none existed before. The legislature has no power to enlarge the force and scope of an existing contract, as, for example, by providing that the estate of a deceased surety shall be liable on a joint undertaking given on appeal.

#### SECTION II.—*Liability of sureties on bills and notes.*

It has already been shown that a person may become surety on a promissory note by signing the same as such, but with or without any addition to his signature indicating his intention, and that the fact that he occupies that relation may be shown by parol.<sup>3</sup> The question as to whether or not a party to a note is a joint maker or surety is of little importance in determining his original liability on his contract, but may be important in establishing, as a defense, that since that liability attached

<sup>1</sup> Babbitt v. Shields (U. S. Supreme Ct.), 21 Alb. L. J. 69; Dolby v. Jones, 2 Dev. Law, 109; Ashby v. Sharp, 1 Litt. 156; Robinson v. Plimpton, 25 N. Y. 487; Smith v. Falconer, 11 Hun, 483; Gardner v. Barney, 24 How. 467, 469; Smith v. Crouse, 24 Barb. 435.

<sup>2</sup> McDonald v. Felt, 49 Cal. 354.

<sup>3</sup> See *ante*, p. 35. Fowler v. Alexander, 1 Heisk. (Tenn.) 425.

it has been discharged by some act of the creditor, or in determining his rights as to parties to the contract other than the person to whom the obligation was given. All parties to a note negotiated before due, without knowledge on the part of the person taking it that some of those purporting to be makers, are, in fact, but sureties, are, as to the holder, regarded as principals ;<sup>1</sup> and the fact that one of two promisors annexes the word "principal" to his signature, and the other the word "surety," does not affect the terms or legal effect of the contract.<sup>2</sup> And it may be laid down as a rule that the liability of a surety on a promissory note is measured by the liability of his principal, provided his principal is in any manner liable thereon.<sup>3</sup>

SECTION 12.—*Liability on bonds of executors and administrators.*

The sureties of an administrator are liable for his failure to deliver to his successor, on demand, property shown to be in his hands, and not accounted for, after the date of his bond as administrator.<sup>4</sup> They are liable also for money set down on the inventory as part of the

<sup>1</sup> Murray v. Graham, 29 Iowa, 520; Shriven v. Lovejoy, 32 Cal. 574.

<sup>2</sup> Hubbard v. Gurney, 64 N. Y. 457; Harris v. Brooks, 21 Pick. 195.

Under the provisions of the New York Code of Civil Procedure relating to letters testamentary, letters of administration and letters of guardianship, "a person to whom letters are issued, is liable for money or other personal property of the estate, which was in his hands, or under his control, when his letters were issued; in whatever capacity it was received by him, or came under his control. Where it was received by him, or came under his control, by virtue of letters previously issued to him, in the same or another capacity, an action to recover the money, or damages for failure to deliver the property, may be maintained upon both official bonds; but, as between the sureties upon the official bond given upon the prior letters, and those upon the official bond given upon the subsequent letters, the latter are liable over to the former." Code of Civ. Pro. § 2596.

<sup>3</sup> See St. Albans' Bank v. Dillon, 30 Vt. 122; Gage v. Lewis, 68 Ill. 604.

<sup>4</sup> Baldwin v. Dearborn, 21 Texas, 446.

estate, although it was received by the administrator in a fiduciary capacity before his appointment.<sup>1</sup> But the bond only binds the sureties for the faithful performance of the duties of the principal as administrator and not for the performance of duties imposed by an appointment of the court ; and if the administrator be appointed a commissioner to make a sale of property, his sureties will not be liable for the application of the proceeds of the sale.<sup>2</sup> So sureties in an executor's bond are responsible only for such acts of their principal as are in the discharge of his official duty, and cannot be held liable for acts beyond the scope of his authority.<sup>3</sup> They are liable, however, for his failure to inventory goods of his testator received before the grant of letters testamentary ;<sup>4</sup> for the application of the assets of the testator's estate to the payment of the debts of the executor, although the executor is solvent ;<sup>5</sup> but are not liable for the rents and profits of the real estate.<sup>6</sup>

In Virginia, under the provisions of the statute concerning executor's bonds, the sureties of the executor are not liable for the proceeds of land sold by him under a power in the testator's will.<sup>7</sup> And in Indiana, the sureties on such bond are not responsible for the proper administration of real estate not directed to be sold by the will.<sup>8</sup> In Alabama, a general administration bond covers all the duties of an administrator, as well in the sale of lands in case of insolvency of the estate as in the settlement of

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<sup>1</sup> *Goode v. Buford*, 14 La. Ann. 102. See *Gottsberger v. Taylor*, 19 N. Y. 150.

<sup>2</sup> *Reeves v. Steele*, 2 Head (Tenn.), 647.

<sup>3</sup> *Gregg v. Currier*, 36 N. H. 200.

<sup>4</sup> *Sherwood v. Hill*, 25 Miss. 391.

<sup>5</sup> *McKenna's Appeal*, 27 Penn. St. 237.

<sup>6</sup> *Hutchenson v. Pigg*, 8 Gratt. (Va.) 220. But see *Strong v. Wilkson*, 14 Mo. 116.

<sup>7</sup> *Burnett v. Hartwell*, 3 Leigh, 89.

<sup>8</sup> *Reno v. Tyson*, 24 Ind. 56.

the personalty;<sup>1</sup> and in States where a special bond is required of the administrator, on the sale of real estate for the payment of debts, the sureties on the original bond of the administrator do not, by reason of the execution of the special bond, escape liability.<sup>2</sup> In Pennsylvania, under the Act of 1832, the sureties on an administrator's bond are not liable for the proceeds of real estate;<sup>3</sup> but in other States it has been held that sureties on such bond are liable, at least in the penalty of the bond, for proceeds received by the administrator from the sale of lands under the order of the court.<sup>4</sup> In Kentucky, the sureties on such bond are liable for such rents as were due the intestate at the time of his death, or were collected by the administrator upon a contract made by his intestate, which passed into the hands of the administrator; but are not liable for rents of lands leased by the administrator and collected by him since the intestate's death.<sup>5</sup>

Where the bond of an administrator, with the will annexed, is in the form of a bond given in ordinary cases of intestacy, the sureties are liable for the proceeds of real estate of the testator sold by the administrator as directed by the will.<sup>6</sup> And in New Hampshire, at least, the sureties on an administrator's bond are liable for the proceeds of lands in another State, with which their principal has

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<sup>1</sup> *Clarke v. West*, 5 Ala. 117.

<sup>2</sup> See *Worgang v. Clipp*, 21 Ind. 119; *Salyers v. Ross*, 15 Ind. 130; *Pettit v. Pettit*, 32 Ala. 288.

<sup>3</sup> *Commonwealth v. Hilgert*, 55 Penn. St. 236.

<sup>4</sup> *Wade v. Graham*, 4 Ham. 126.

<sup>5</sup> *Wilson v. Unsett*, 12 Bush (Ky.), 215. But see *Brown v. Brown*, 2 Harring. 5; *State v. Waples*, 5 Harring. 257.

<sup>6</sup> *Shalter's Appeal*, 43 Penn. St. 83; *Hartzell v. Commonwealth*, 42 Penn. St. 453. See *Zeigler v. Sprengle*, 7 Watts & Serg. 175; *Commonwealth v. Forney*, 3 Watts & Serg. 353; *Almond v. Mason*, 9 Gratt. 700. But not for the non-payment of a legacy. *Small v. Commonwealth*, 8 Barr, 101.

been charged in the settlement of his administration account in his own State.<sup>1</sup>

The sureties of a solvent administrator are liable for a debt due by him personally to the estate,<sup>2</sup> but are not liable if he charges himself with a debt with which he is not legally chargeable as administrator.<sup>3</sup> Nor are they liable for debts contracted by the administrator in the settlement of the estate;<sup>4</sup> such as probate fees and like obligations.

The sureties of a special administrator are liable for money belonging to the estate, received by him before his appointment, and as the agent of a previous administrator to whom he succeeded.<sup>5</sup>

The sureties of an executor or administrator will not be held liable for the non-performance by their principal of an act rendered impossible by the act of God or the public enemy;<sup>6</sup> nor will they be visited with penalties, and their liabilities extended, beyond the strict letter of the obligation into which they have entered.<sup>7</sup>

A refusal to comply with a void decree of a probate court will not be a breach of the bond;<sup>8</sup> nor will the sureties of the administrator be liable for a breach of a covenant in his deed of the real estate of the deceased.<sup>9</sup>

Where the same person is named as an executor and as a devisee in a will, and a duty is imposed upon him by the will as a devisee only, the sureties will not be liable for a neglect of that duty.<sup>10</sup>

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<sup>1</sup> *Judge of Probate v. Heydock*, 8 N. H. 491.

<sup>2</sup> *Piper's Estate*, 15 Penn. St. 533.

<sup>3</sup> *Harker v. Irick*, 2 Stockt. (N. J.) 269.

<sup>4</sup> *Taylor v. Mygatt*, 25 Conn. 184.

<sup>5</sup> *Gottsberger v. Taylor*, 19 N. Y. 150.

<sup>6</sup> *The Ordinary, &c. v. Corbett*, 1 Bay, 328.

<sup>7</sup> *Ohio v. Cutting*, 2 Ohio (N. S.), 1.

<sup>8</sup> *Hancock v. Hubbard*, 19 Pick. 167.

<sup>9</sup> *Merrill v. Harris*, 6 Foster (N. H.), 142.

<sup>10</sup> *Sims v. Lively*, 14 B. Mon. (Ky.) 433.

Generally speaking, the liability of the sureties, on an administrator's bond, is co-extensive with that of their principal.<sup>1</sup> They are liable for his proper distribution of moneys received by him from a railroad company, after suit or otherwise, for the negligent killing of his intestate;<sup>2</sup> and in Missouri and some of the other States, the sureties on the bond of an administrator are liable for the misapplication of the rents and profits of land received by him.<sup>3</sup>

Where a second bond is required of an administrator by an order of the court, the sureties in the second bond are liable for any breach of its conditions occurring after its execution;<sup>4</sup> and when such bond is filed upon the death of a surety in the original bond, by order of the court, without the complaint of the parties interested, the sureties on the first bond are relieved from all liability accruing after the execution of the second bond;<sup>5</sup> but not for prior defalcation.<sup>6</sup>

The sureties are estopped from denying that their principal was an administrator as described in the bond.<sup>7</sup>

In case of the death of the administrator, his sureties will not be liable for moneys coming into the hands of his successor.<sup>8</sup>

### SECTION 13.—*Liability as Bail.*

A person indicted for an offense, and who has entered into a recognizance, with sureties, for his appearance, is,

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<sup>1</sup> *Wattles v. Hyde*, 9 Conn. 10.

<sup>2</sup> *Goltra v. People*, 53 Ill. 224.

<sup>3</sup> *Stong v. Wilkson*, 14 Mo. 116.

<sup>4</sup> *Owen v. State*, 25 Ind. 371.

<sup>5</sup> *State v. Stroap*, 22 Ark. 328.

<sup>6</sup> *M'Meekin v. Huson*, 3 Strobb. 327. See *Erricks v. Powell*, 2 Strobb. Eq. 196.

<sup>7</sup> *Outlaw v. Yell*, 3 Eng. 345.

<sup>8</sup> *People v. Allen*, 86 Ill. 166.

in the eyes of the law, in the custody of his sureties until formally surrendered to the sheriff, or until discharged by due course of law. They are not only bound for his appearance at the term mentioned in the recognizance, but, as it is sometimes held, are bound for his appearance from term to term, and from day to day of each term;<sup>1</sup> and if their principal escape during the progress of his trial and fails to return, his sureties are liable.<sup>2</sup> Their liability is measured by the recognizance; and they cannot be held for any sum exceeding the penalty named therein.<sup>3</sup> When the appearance of the principal alone is covenanted for in the recognizance, non-appearance is a forfeiture of the undertaking.<sup>4</sup>

But a recognizance will be strictly construed;<sup>5</sup> and if the sureties undertake that their principal shall appear before the "circuit" court of a county, when in fact there never was such a court, they are not liable for his non-appearance before any other court.<sup>6</sup> If the grand jury fail to find an indictment against the principal, the bail have a right to presume the prosecution ended, and his further appearance unnecessary;<sup>7</sup> and if the grand jury find an indictment against him for an offense other than that specified in the undertaking, they will not be liable for his default in not appearing to answer to the offense mentioned in the indictment.<sup>8</sup> But it has been held that if the principal is recognized to appear to answer for a

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<sup>1</sup> *Lee v. State*, 51 Miss. 665; *Chase v. People*, 2 Col. T. 528; *Moore v. State*, 28 Ark. 480; *State v. Smith*, 66 N. C. 620; *State v. Ryan*, 23 Iowa, 406. But see *Townsend v. People*, 14 Mich. 388.

<sup>2</sup> *Lee v. State*, 51 Miss. 665; *People v. McCoy*, 39 Barb. 73.

<sup>3</sup> *Gray v. Cook*, 3 Houst. (Del.) 49.

<sup>4</sup> *Wallenwebber v. Commonwealth*, 3 Bush (Ky.), 68.

<sup>5</sup> *Sherman v. West*, 4 Kansas, 570.

<sup>6</sup> *Sherman v. West*, 4 Kansas, 570.

<sup>7</sup> *Commonwealth v. Blincoe*, 3 Bush (Ky.), 12.

<sup>8</sup> *People v. Sloper*, 1 Idaho Ter. 183; *State v. Brown*, 16 Iowa, 314. To the contrary, see *People v. Meacham*, 74 Ill. 292.



charge of assault and battery, but is indicted for murder, the reason is the stronger why the sureties should bring him before the court, and that the indictment for the higher offense is no defense to the sureties.<sup>1</sup>

If the sureties suffer their principal to go into another State, where he is arrested and imprisoned, they will be liable for his default,<sup>2</sup> unless the principal is held by the military authorities of the United States,<sup>3</sup> and even then, they will be held liable in some States;<sup>4</sup> and they cannot successfully defend an action brought on the recognizance, by showing that the principal, after forfeiture, but before the action on the recognizance, enlisted in the service of the United States and rendered his surrender impossible.

Where the sureties enter into a recognizance with their principal for his appearance in court, "to answer the charge" preferred against him, this liability is not discharged by his appearance and plea, if he was not surrendered and taken into the custody of the court. "To answer the charge" is not merely to plead to it, but imports that the principal shall hold himself answerable to it until discharged by the court or surrendered to its custody.<sup>5</sup> If the principal appears and pleads to the charge, and, before a verdict and judgment are rendered against him, escapes, the sureties are liable.<sup>6</sup> But this would be otherwise in some of the States if the principal

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<sup>1</sup> *Pack v. State*, 23 Ark. 235; *Adams v. Governor*, 22 Ga. 417. See *Campbell v. State*, 18. Ind. 375; *State v. Cole*, 12 La. Ann. 471.

<sup>2</sup> *Wetherow v. Commonwealth*, 1 Bush (Ky.), 17; *Taintor v. Taylor*, 36 Conn. 242; S. C. 4 Am. R. 58; *Ingram v. State*, 27 Ala. 17; *Devine v. State*, 5 Sneed (Tenn.), 623.

<sup>3</sup> *Commonwealth v. Webster*, 1 Bush (Ky.), 616; *Commonwealth v. Terry*, 2 Duvall (Ky.), 383; *Belding v. State*, 25 Ark. 315; S. C. 4 Am. R. 26; *People v. Cushney*, 44 Barb. 118.

<sup>4</sup> *Huggins v. People*, 39 Ill. 241; *Shook v. People*, 39 Ill. 443; *Gingrich v. People*, 34 Ill. 448.

<sup>5</sup> *Wintersoll v. Commonwealth*, 1 Duvall (Ky.), 177.

<sup>6</sup> *Id.*

had been indicted for a felony, and, after his appearance "in discharge of the recognizance, had escaped during the progress of the trial.<sup>1</sup> In New York, where a recognizance is conditioned that the defendant shall appear at the next court of oyer and terminer to answer to an indictment for a felony, that he shall not depart without leave of the court, and that he shall abide its order and decision, the condition is construed to mean, not that the defendant shall simply submit to a trial, but that he shall at all times, until surrendered or ordered into custody, submit himself to the jurisdiction or authority of the court; and that he shall be held to answer during the whole term of the court and until the trial is ended; and if the prisoner appears in court, answers when called, and, without having been surrendered by his bail or ordered into the custody of the sheriff, enters upon his trial, but before it is concluded departs from the court without leave, and does not again return to abide the order and decision of the court, his recognizance is forfeited and the sureties liable.<sup>2</sup>

#### SECTION 14.—*Liability on guardians' bonds.*

The bond of a guardian covers moneys of the ward's estate received by the guardian from any other source; and the recovery on it may extend to the value of the whole estate of the ward.<sup>3</sup>

The liability of a surety upon a guardian's bond is not discharged by the death of the surety in all cases. Where a default of a guardian occurs subsequent to the death of a surety in his bond, the estate of the surety is liable.<sup>4</sup>

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<sup>1</sup> *Askins v. Commonwealth*, 1 Duvall (Ky.), 275; *Commonwealth v. Coleman*, 2 Metc. (Ky.) 382.

<sup>2</sup> *People v. McCoy*, 39 Barb. 73; and see *People v. Stager*, 10 Wend. 431.

<sup>3</sup> *Hunt v. State*, 53 Ind. 321.

<sup>4</sup> *Voris v. State*, 47 Ind. 345. See *Moore v. Wallis*, 18 Ala. 458.

Where a guardian has given a bond with sureties, and afterwards voluntarily gives another bond with other sureties, the liability of the sureties in the first bond is at an end, as the latter bond relates back to the appointment of the guardian.<sup>1</sup> Where a guardian is required to execute two bonds in different courts, the one for the management of the personal estate and the other for the management of the real estate of the infant, the sureties on the two bonds will be regarded as joint sureties, each being liable to the infant for the whole amount.<sup>2</sup>

As to the commencement and duration of the liability of a surety on the bond of a guardian, the courts have held the surety liable for moneys received by the guardian before the bond was executed;<sup>3</sup> but have denied the existence of any liability for moneys received after a

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<sup>1</sup> *Sayers v. Cassell*, 23 Gratt. (Va.) 525. But see *Sebastian v. Bryan*, 21 Ark. 447; *Jones v. Blanton*, 6 Ired. Eq. 115. But where one of three sureties moves for counter security and is released by the court upon the guardians executing a new bond with two other sureties, the two remaining sureties in the first bond are jointly liable with the sureties in the new bond. *Boyd v. Gault*, 3 Bush (Ky.), 644. See *Frederick v. Moore*, 13 B. Mon. 470; *M'Math v. State*, 6 Har. & J. 98.

If the original bond given by a guardian is for too small a sum, and the guardian voluntarily gives an additional bond, the second bond is as binding on him as if given in compliance with an order of the court; *Potter v. State*, 23 Ind. 550; and, generally, one who voluntarily signs a guardian's bond which has been accepted by the court, is estopped from setting up that the court did not order it to be made. *Sebastian v. Bryan*, 21 Ark. 447. See *Elam v. Barr*, 14 La. Ann. 671.

Where new sureties are given they become liable for breaches of the bond before they become sureties, as well as for subsequent breaches. *Bryant v. Owen*, Kelly, 355; *Justices v. Woods*, Id. 84; *Steele v. Reese*, 6 Yerg. 263.

Where the letters of guardianship have been revoked, and the same person reappointed guardian, and has given a new bond with new sureties, the old sureties are still liable for any defalcation which existed before the letters were revoked. *Bellune v. Wallace*, 2 Rich. 80.

<sup>2</sup> *Elbert v. Jacoby*, 8 Bush (Ky.), 542.

<sup>3</sup> *Merrels v. Phelps*, 34 Conn. 109. But the sureties on a bond conditioned for the future faithful performance of the guardianship are not liable for the previous default of the guardian. *Sebastian v. Bryan*, 21 Ark. 447.

decree by a competent court removing the guardian, although an appeal, which was not prosecuted, was taken from the decree.<sup>1</sup>

For the failure of the guardian to account for moneys received from the sale of real estate of his ward, or its misappropriation by him, the sureties on the general bond of the guardian are not liable, as such sale is no part of his general duties;<sup>2</sup> and for the non-payment by a guardian of a balance due at an annual settlement, there being no final settlement, the sureties are not liable.<sup>3</sup> If, on the expiration of the guardianship during the minority of the ward, the guardian leaves the State without paying the balance due, the surety on his bond will not be liable until the appointment of a new guardian and demand made.<sup>4</sup> The action on the bond must be brought by the successor of the defaulting guardian;<sup>5</sup> and no suit by the infant ward to recover money in the guardian's hands will lie until the removal of the guardian.<sup>6</sup>

The general bond of a guardian covers money due from the guardian to his ward at the time of his appointment, and the rent of real estate occupied by him before that time;<sup>7</sup> and it covers property of the ward received by him in another State;<sup>8</sup> and all moneys

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<sup>1</sup> *Merrels v. Phelps*, 34 Conn. 109.

<sup>2</sup> *Henderson v. Coover*, 4 Nev. 429. See *Potter v. State*, 23 Ind. 607; *Warwick v. State*, 5 Ind. 350. But see *Pratt v. McJunkin*, 4 Rich. 5. It has been held, however, that the sureties on a guardian's bond are liable for the proceeds of the ward's land sold under a decree, and which have come to the hands of the guardian, although a special bond for the faithful disbursement of the proceeds has been taken in compliance with a statute. *Withers v. Hickman*, 6 B. Mon. 292; *Taylor v. Taylor*, Id. 559.

<sup>3</sup> *Sebastian v. Bryan*, 21 Ark. 447.

<sup>4</sup> *Favorite v. Booher*, 17 Ohio St. 548.

<sup>5</sup> *Blackwell v. State*, 26 Ind. 204.

<sup>6</sup> *Eli v. Hawkins*, 15 Ind. 230.

<sup>7</sup> *Mattoon v. Cowing*, 13 Gray, 387.

<sup>8</sup> *McDonald v. Meadows*, 1 Metc. (Ky.) 507.

actually received by him, including the proceeds of lands sold by an executor improperly appointed, or without authority to sell,<sup>1</sup> and moneys coming into his hands from an estate on which no administration had been had.<sup>2</sup>

If money has been inadvertently paid to a guardian on account of his ward, and he is unable to pay it back, his surety will not thereby be rendered liable, as the case is not included in the covenants of the bond.<sup>3</sup> But it is held, that if an administrator has paid over funds belonging to the estate, to a guardian, he is entitled to have the amount, or so much thereof as is necessary, to pay debts refunded to him; and that the sureties of the guardian are liable to the administrator for the amount the guardian is liable to refund for the payment of debts.<sup>4</sup>

If a person, acting in the double capacity of executor of a will and guardian of a minor, receive a legacy left by such will to the minor, he holds such legacy in his capacity as executor, and not as guardian, until he settles an account of his administration in the proper court, crediting himself, as executor, with the legacy, and charging himself therewith as guardian; and, until his account is allowed by the court, no action will lie against him and his sureties on his bond as guardian for neglect to pay the legacy; but the action will lie on his bond as executor.<sup>5</sup>

The extent of the recovery in an action of debt on the bond of a guardian, is limited to the amount of the penalty of the bond.<sup>6</sup> An action on the bond will lie for

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<sup>1</sup> *Alston v. Alston*, 34 Ala. 15.

<sup>2</sup> *Warwick v. State*, 5 Ind. 350.

<sup>3</sup> *Ballard v. Brummitt*, 4 Strobb. Eq. 171.

<sup>4</sup> *Wilson v. Soper*, 13 B. Mon. 411.

<sup>5</sup> *Conkey v. Dickinson*, 13 Metc. 51. And see *Burton v. Tunnell*, 4 Harring. 424.

<sup>6</sup> *Woods v. Commonwealth*, 8 B. Mon. 112.

not delivering up the property of the ward, though a delivery of the property has not been ordered by the court.<sup>1</sup>

Where, on the settlement of a guardianship, the court has directed the deposit of moneys due the ward with the clerk, and the clerk has converted the money so deposited to his own use, the guardian and his sureties will be liable on their bond for the money so converted, in the absence of any statute making it one of the duties of the clerk to receive money due a ward from a guardian,<sup>2</sup> and the sureties on the official bond of the clerk will not be liable.<sup>3</sup>

SECTION 15.—*Liability on guaranties of collection or payment.*

A guaranty of the collection of a note or other obligation, is an undertaking that the note or obligation will be collectible at its maturity by the ordinary process of law; and before the maker or principal debtor can be held liable in an action upon his contract, the creditor must be in a position to show, either that he has exhausted his legal remedy upon the note or other obligation,<sup>4</sup> or that, by reason of the insolvency of the principal debtor, legal proceedings against him would be unavailing;<sup>5</sup> and in some cases it has been held, that even where the principal is insolvent, the creditor must proceed to judgment and execution against him before resorting to the contract of the guarantor.<sup>6</sup>

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<sup>1</sup> Jarrett v. State, 5 Gill & Johns. 27.

<sup>2</sup> State v. Flemming, 46 Ind. 206.

<sup>3</sup> Scott v. State, 46 Ind. 203.

<sup>4</sup> Stone v. Rockefeller, 29 Ohio St. 625.

<sup>5</sup> Stone v. Rockefeller, 29 Ohio St. 625; Woods v. Sherman, 71 Penn. St. 100; Brackett v. Rich, 23 Minn. 485; S. C. 23 Am. R. 703.

<sup>6</sup> Craig v. Parkis, 40 N. Y. 181. But see Woods v. Sherman, 71 Penn. St. 100.

In regard to a proper construction of a contract of this kind the authorities disagree. By some it is held, that such a guaranty is an undertaking that the note is collectible by due process of law, and that the guarantor undertakes to pay only when it is ascertained that it cannot be collected by suit prosecuted to judgment and execution against the maker ; and that the endeavor to collect of the maker, by this due course of law, is a condition precedent to the right of action against the guarantor. This is the view of the law taken in New York, Wisconsin and Michigan, and perhaps in some of the other States.<sup>1</sup> In these States it is held that the creditor has no right to determine, on his own responsibility, whether the debt is collectible—that being a question which the guarantor has made it incumbent on him to ascertain by recourse to the ordinary rules provided by the law for the collection of debts.

By other authorities it is held that a guaranty of collection is an undertaking by the guarantor to pay, if payment cannot, by due and reasonable diligence, be obtained from the maker ; or, as it is sometimes expressed, that the note is “capable of being collected.” This is the view taken in Vermont,<sup>2</sup> Connecticut,<sup>3</sup> Maine,<sup>4</sup> Pennsyl-

<sup>1</sup> *Craig v. Parkis*, 40 N. Y. 181 ; *Moakley v. Riggs*, 19 Johns. R. 69 ; *White v. Case*, 13 Wend. 543 ; *Eddy v. Stanton*, 21 Wend. 255 ; *Taylor v. Bullen*, 6 Cow. 624 ; *Burt v. Fowler*, 5 Barb. 501 ; *Loveland v. Shepherd*, 2 Hill, 139 ; *Manning v. Haight*, 14 Barb. 76 ; *Newell v. Fowler*, 23 Barb. 628 ; *Vanderveer v. Wright*, 6 Barb. 547 ; *Dyer v. Gibson*, 16 Wis. 557 ; *French v. Marsh*, 29 Wis. 649 ; *Bosman v. Akeley*, 39 Mich. 710 ; S. C. 33 Am. R. 447. See *ante*, p. 110.

<sup>2</sup> *Wheeler v. Lewis*, 11 Vt. 265 ; *Sylvester v. Downer*, 18 Vt. 32 ; *Bull v. Bliss*, 30 Vt. 127 ; *Dana v. Conent*, 30 Vt. 246.

<sup>3</sup> *Perkins v. Catlin*, 11 Conn. 213 ; *Ransom v. Sherwood*, 26 Conn. 437.

<sup>4</sup> *Gilligham v. Boardman*, 29 Me. 79.

vania,<sup>1</sup> Massachusetts,<sup>2</sup> Texas,<sup>3</sup> Minnesota,<sup>4</sup> in the Supreme Court of the United States,<sup>5</sup> and probably in other States. It is held, in Ohio, that to fix the liability of a guarantor, under a guaranty of collection of a note, it is usually necessary to prosecute the maker to judgment, and a return of "no property;" but that this extreme test will not be required, where the maker of the note, at its maturity, is insolvent and without any property subject to execution.<sup>6</sup>

In *Camden v. Doremus*,<sup>7</sup> Justice Daniel says: "The condition to which the plaintiff (a guarantor) was pledged, was the practice of due—that is, proper, just, reasonable—diligence; not to the performance of acts which were obviously useless and from which expense and injury might arise, but from which advantage certainly could not. The diligent and honest prosecution of a suit to judgment, with a return of *nulla bona*, has always been regarded as one of the extreme tests of due diligence. This phrase, and the obligation it imparts, may be satisfied, however, by other means. The ascertainment, upon correct and sufficient proofs of entire or notorious insolvency, is recognized by the law as answering the demand of due diligence, and as dispensing, under such circumstances, with the mere dilatory evidence of a suit."

And in the Pennsylvania case cited,<sup>8</sup> the court says: "The law requires no man, in the pursuit of his rights, to do a vain and futile thing, useful to nobody and hurtful

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<sup>1</sup> *M'Doal v. Yeomans*, 8 Watts, 361; *McClurg v. Fryer*, 15 Penn. St. 293; *Woods v. Sherman*, 71 Penn. St. 100.

<sup>2</sup> *Marsh v. Day*, 18 Pick. 321; *Sanford v. Allen*, 1 Cush. 473.

<sup>3</sup> *Shepard v. Shears*, 35 Texas, 763.

<sup>4</sup> *Brackett v. Rich*, 23 Minn. 485; 23 Am. R. 703.

<sup>5</sup> *Camden v. Doremus*, 3 How. (U. S.) 515.

<sup>6</sup> *Stone v. Rockefeller*, 29 Ohio St. 625.

<sup>7</sup> 3 How. (U. S.) 515, 533.

<sup>8</sup> *McClurg v. Fryer*, 15 Penn. St. 293.



to himself by the needless expense and trouble it would impose. Insolvency, hopeless or utter insolvency, may be proved, like everything else depending on facts, by parol, as well as by record, and we cannot hold that it is necessary to sue a beggar."

In the dissenting opinion in *Craig v. Parkes*,<sup>1</sup> Justice Mason says: "It is insisted that the judgment, and the issuing and return of an execution *nulla bona*, is, under all circumstances, the best evidence of the debtor's inability to pay? If it is, it cannot be maintained, His recent discharge, under the bankrupt act of Congress or under the insolvent laws of the State, on the petition of two-thirds of his creditors, is better evidence of his insolvency than the sheriff's certificate upon the execution, that he has no goods or chattels, lands or tenements. The one is preceded by a full and complete judicial investigation into the property and affairs of the bankrupt, and the certificate of discharge is only issued when the property of the debtor has been made over to the assignee for the benefit of creditors. The other is the certificate of a ministerial officer, often made upon the very slightest investigation, and never more than *prima facie* evidence."

So much has been given to show the current of authority and the reasoning on which it is based, although as a general rule it must be conceded that it is of more importance to know what the rule is than why it was so settled. If there are several makers of a note, the creditor cannot maintain an action against the guarantor until he has placed himself in a condition to show his inability to collect the note, by reasonable diligence, of any or all of the makers.<sup>2</sup> But if the creditor took collateral security, he is not required to exhaust that before suing the guarantor.<sup>3</sup>

<sup>1</sup> 40 N. Y. 181-189.

<sup>2</sup> *Aldrich v. Chubb*, 35 Mich. 350.

<sup>3</sup> *Stone v. Rockefeller*, 29 Ohio St. 625; *Ege v. Barnitz*, 8 Barr. 304.

On the other hand, the liability of the guarantor of the payment of a promissory note, where the guaranty is absolute and unconditional, does not depend upon the solvency or insolvency of the maker or indorser, and the holder may maintain an action against the guarantor on his contract without first instituting proceedings against the maker.<sup>1</sup> But if the guaranty expressly provides that the legal remedy against the debtor shall be first exhausted, an execution against the maker must be returned unsatisfied before the creditor can proceed against the guarantor.<sup>2</sup>

If the contract is a guaranty of both collection and payment, the holder may proceed in the first instance either against the maker or the guarantor, and if he proceeds against the maker and fails to collect, he has still his remedy against the guarantor, not only for the amount of the debt guaranteed but also for the costs of the former action.<sup>3</sup> And generally the guarantor of the collection of a demand is liable, not only for its amount if uncollectible, but also for the costs of the action brought against the principal debtor to enforce payment by him.<sup>4</sup>

The addition of the words, "out of the assets placed in my hands as assignee" of the maker of a note, to a guaranty of payment, will not restrict the liability of the guarantor, although he is instructed by the attorney of the payee, at the time of entering into the contract, that it will have that effect.<sup>5</sup>

If the act of the holder of the obligation prevents the

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<sup>1</sup> *Penny v. Crane Brothers Manufacturing Co.* 80 Ill. 244.

<sup>2</sup> *Jones v. Greenlaw*, 6 Coldw. (Tenn.) 342.

<sup>3</sup> *Watson v. Watson*, 47 How. (N. Y.) 240.

<sup>4</sup> *Mosher v. Hotchkiss*, 3 Abb. (N. Y.) App. Dec. 326.

<sup>5</sup> *Wadsworth v. Smith*, 43 Iowa, 439.

collection of the debt from the principal debtor, the guarantor is not liable on his contract.<sup>1</sup>

SECTION 16.—*Liability on bonds of indemnity.*

The liability of a surety on a bond or other contract of indemnity, will depend on the terms of the instrument creating the liability. In contracts of indemnity where the obligation is to perform some specific thing, or to save the obligee from a charge or liability, the contract is broken when there is a failure to do the specific act, or when such charge or liability is incurred.<sup>2</sup> But when the obligation is that the party indemnified shall not sustain *damage or molestation* by reason of the acts or omissions of another, or by reason of any liability incurred through such acts or omissions, there is no breach until actual damage is sustained.<sup>3</sup> In the latter case, a judgment recovered against the party indemnified on account of the acts or neglect of another for which he is answerable, without payment of the judgment or some part thereof, does not entitle him to sustain an action against the obligors in the bond of indemnity.<sup>4</sup>

Thus, where a deputy sheriff and his sureties executed a bond to the sheriff, conditioned that the deputy should so demean himself in all matters touching his duty that the sheriff should not sustain any damage or molestation by reason of any act done or liability incurred by or through such deputy, and afterwards judgments are recovered against the sheriff for the failure of his deputy to return executions in his hands, these facts will not constitute a breach of the bond of the deputy and his sureties, and will not entitle the sheriff to maintain an action

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<sup>1</sup> Stark v. Fuller, 42 Penn. St. 320.

<sup>2</sup> Gilbert v. Wiman, 1 N. Y. 550; Belloni v. Freeborn, 63 N. Y. 383; Johnson v. Gilbert, 9 Hun, 469.

<sup>3</sup> Id.

<sup>4</sup> Gilbert v. Wiman, 1 N. Y. 550.

thereon in the absence of proof that some part of the judgments have been paid by the sheriff, or that he has sustained actual damage.<sup>1</sup>

On the other hand, where a bond is conditioned as well to pay a debt or sum specified, as to indemnify and save harmless the obligee against his liability to pay the same, the obligee may recover the entire debt or demand, upon default in the payment, without having paid anything.<sup>2</sup> The distinction between the two classes of cases is very important. It is the distinction between an affirmative covenant for a specific thing, and one of indemnity against damage by reason of the thing specified. The object of both may be to save the covenantee from damages, but their legal consequences to the parties are essentially different.<sup>3</sup>

Where a bond is given to a constable, conditioned to keep him harmless and indemnified of, from, and against all damages, costs, charges, trouble and expense, that he may be put to, sustain, or suffer, by reason of a levy upon and sale of property on execution, there will be a breach of the condition, and an action may be maintained on the bond as soon as a *liability* is incurred by the officer on account of such levy and sale.<sup>4</sup> The obligee in such bond is not bound first to advance his own money to discharge a liability before he can seek indemnity by an action on the bond. In such action the plaintiff may recover not only the amount he has actually expended in the defense

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<sup>1</sup> Gilbert v. Wiman, 1 N. Y. 550.

<sup>2</sup> Belloni v. Freeborn, 63 N. Y. 383; Churchill v. Hunt, 3 Denio, 321; Rockefeller v. Donnelly, 8 Cow. 623; Wright v. Whiting, 40 Barb. 235; Jarvis v. Sewell, 40 Barb. 449; Port v. Jackson, 17 Johns. 239, 479. And see Chace v. Hinman, 8 Wend. 453; Webb v. Pond, 19 Wend. 423; Thomas v. Allen, 1 Hill, 145; Cady v. Allen, 22 Barb. 388.

<sup>3</sup> Rector, &c. of Trinity Church v. Higgins, 48 N. Y. 532; Gilbert v. Wiman, 1 N. Y. 550. See Gregory v. Hartley, 6 Neb. 356.

<sup>4</sup> Bancroft v. Winspear, 44 Barb. 209.

of an action against him by one claiming to be the owner of the property levied on, but also the costs and counsel fees of his attorney and counsel in defending such suit, although the obligee has not actually paid the fees at the time of commencing his action.<sup>1</sup>

In some cases, it is held that upon an agreement to *indemnify*, actual compensation should only be allowed for actual loss.<sup>2</sup>

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<sup>1</sup> Id. But see *Scott v. Tyler*, 14 Barb. 202, *contra*.

<sup>2</sup> *Churchill v. Hunt*, 3 Denio, 321; *Waller v. Eames*, 15 Minn. 440; S. C. 2 Am. R. 147.

## CHAPTER X.

### NOTICE OF ACCEPTANCE OR OF DEFAULT.

- Section 1.—Notice of acceptance of a guaranty.  
2.—Notice of advances made.  
3.—Waiver of notice of acceptance.  
4.—Character of the notice required.  
5.—Notice to guarantor of default of principal.  
6.—What notice is required.  
7.—Notice to surety of default of principal.

#### SECTION 1.—*Notice of acceptance of a guaranty.*

The question as to whether a guarantor is, or is not, entitled to notice of the acceptance of his guaranty has led to many conflicting decisions. Much of this conflict of authority has resulted from a failure to distinguish between absolute guaranties of existing obligations, the amount and extent of which was known to the guarantor at the time of entering into his contract, and prospective and contingent guaranties of debts to be contracted or liabilities to be incurred, the amount and extent of which was unknown to the guarantor at the time of executing the guaranty.

In the courts of the United States, and in the courts of New England, Pennsylvania, Ohio, Missouri, Texas, Kentucky, Alabama and many of the other States, it is well settled that notice of acceptance is necessary to complete the obligation of prospective and contingent guaranties.<sup>1</sup> While in New York and some of the other

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<sup>1</sup> Central Savings Bank *v.* Shine, 48 Mo. 456; Smith *v.* Anthony, 5 Mo. 504; Rankin *v.* Childs, 9 Mo. 676; Douglass *v.* Reynolds, 7 Pet. 113; Reynolds *v.* Douglass, 12 Pet. 497; Russell *v.* Clark, 7 Cranch, 69; Edmonston *v.* Drake, 5 Pet. 624; Lee *v.* Dick, 10 Pet. 482; Tuckerman *v.* French, 7 Me. 115;

States it is held, that in case of a direct absolute guaranty, notice of acceptance is unnecessary to bind the guarantor.<sup>1</sup>

The courts make a clear distinction between a mere proposal to guarantee a contingent liability, and a direct contract to be responsible for the fulfillment of a contract already made, and within the knowledge of the guarantor at the time he signs his obligation.<sup>2</sup> The rule seems to be that if the guaranty is absolute in terms, definite as to amount and extent, notice is dispensed with.<sup>3</sup> But if the guaranty be for future advances, credits or payments, it is the duty of the party making the advances to give notice to the guarantor of his acceptance, and of his consent to make the advances on the credit of the guaranty.<sup>4</sup>

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*Bradley v. Carey*, 8 Me. 234; *Craft v. Isham*, 13 Conn. 28; *Oakes v. Weller*, 13 Vt. 106; *Lowry v. Adams*, 22 Id. 166; *Babcock v. Bryant*, 12 Pick. 133; *Mussey v. Raynor*, 22 Pick. 223; *Mayfield v. Wheeler*, 37 Texas, 256; *Davis Sewing Machine Co. v. Jones*, 61 Mo. 409; *Montgomery v. Kellogg*, 43 Miss. 486; S. C. 5 Am. R. 508; *McCollum v. Cushing*, 22 Ark. 540; *Kellogg v. Stockton*, 29 Penn. St. 460; *Cahuzac v. Samini*, 29 Ala. 288; *Bell v. Kellar*, 13 B. Mon. 381; *Grice v. Ricks*, 3 Dev. 62; *Hill v. Calvin*, 4 How. (Miss.) 231; *Taylor v. Wetmore*, 10 Ohio, 490; *Lawson v. Towner*, 2 Ala. 273; *Clafin v. Briant*, 58 Ga. 414.

<sup>1</sup> *Carman v. Elledge*, 40 Iowa, 409; *Case v. Howard*, 41 Iowa, 479; *Union Bank v. Coster's Executors*, 3 N. Y. 204; *Bright v. McKnight*, 1 Sneed (Tenn.), 158; *Saunders v. Etcherson*, 36 Ga. 404; *Yancey v. Brown*, 3 Sneed (Tenn.), 89; *Beebe v. Dudley*, 6 Foster (N. H.), 249; *Farmers &c. Bank v. Kercheval*, 2 Mich. 204; *Jackson v. Yandes*, 7 Blackf. 526.

<sup>2</sup> *Davis Sewing Machine Co. v. Jones*, 61 Mo. 409.

<sup>3</sup> *Montgomery v. Kellogg*, 43 Miss. 486; S. C. 5 Am. R. 508; *Carman v. Elledge*, 40 Iowa, 409; *Case v. Howard*, 41 Iowa, 479; *Davis Sewing Machine Co. v. Jones*, 61 Mo. 409; *Saunders v. Etcherson*, 36 Ga. 404; *Dickerson v. Derrickson*, 39 Ill. 574; *Cooke v. Orne*, 37 Ill. 186; *Thrasher v. Ely*, 2 S. & M. 147.

<sup>4</sup> *Montgomery v. Kellogg*, 43 Miss. 486; S. C. 5 Am. R. 508; *Burrell v. Clarke*, 7 Cranch, 69; *Edmunson v. Drake*, 5 Pet. 629; *Douglass v. Reynolds*, 7 Pet. 113; *Lee v. Dick*, 10 Pet. 482; *Adams v. Jones*, 12 Pet. 207; *Carson v. Hill*, 1 McMullan 76; *Central Savings Bank v. Shine*, 48 Mo. 456; S. C. 8 Am. R. 112; *Mayfield v. Wheeler*, 37 Texas, 256; *McCollum v. Cushing*, 22 Ark. 511; *Maynard v. Morse*, 36 Vt. 617.

The rule deduced from the authorities by Mr. Parsons is, that where there is a guaranty for future operations, perhaps for one of uncertain amount, there should be a distinct notice of acceptance, and also of the amount advanced upon the guaranty, unless the amount be the same that is specified in the guaranty itself.<sup>1</sup>

<sup>1</sup> 2 Pars. on Cont. (5th ed.) 13. See *Lawton v. Maner*, 9 Rich. Law (S. C.), 335; *Mayfield v. Wheeler*, 37 Texas, 256.

A guaranty in the words: "We take pleasure in recommending C. to you as a gentleman worthy of your confidence, and if they should have any dealings with you, we hereby bind ourselves to make good and pay any amount he may be indebted to you on settlement, not exceeding \$1,500. This guaranty to remain in full force until revoked by us," was held to require a notice of acceptance by the parties to whom it was addressed before recourse could be had against the guarantors. *Wardlaw v. Harrison*, 11 Rich. Law (S. C.), 626.

In *Douglass v. Reynolds* (7 Pet. 113), a letter was addressed by the defendant to the plaintiff in the following words: "Gentlemen—Our friend, Mr. C. H., to assist him in business may require your aid, from time to time, either by acceptance or indorsement of his paper, or advances in cash. In order to save you from harm in so doing, we do hereby bind ourselves, severally and jointly, to be responsible to you for any sum not exceeding \$8,000, should the said C. H. fail to do so." It was held that this was a guaranty, and that to hold the guarantors liable they were entitled to notice of acceptance.

In Maine, the following instrument was construed in the same way: "Gentlemen—For the bill of goods which C. B. P. bought of you on the 6th instant, I hold myself responsible to you for payment, agreeably to the contract made with him; and I will hold myself responsible for any goods which you may sell him, provided the amount does not exceed, at any time, \$500." This was decided to be a guaranty, and, as the plaintiff did not give notice of its acceptance in the first instance, nor of the delivery of the goods under it subsequently, he could not succeed in his action. *Tuckerman v. French*, 7 Me. 115. A similar decision was made in the case of *Bradley v. Cary*, 8 Me. 234. The question was decided in the same way, on essentially the same state of facts, in *Craft v. Isham*, 13 Conn. 28; *Oakes v. Weller*, 13 Vt. 106; *Lowry v. Adams*, 22 Vt. 166; *Babcock v. Bryant*, 12 Pick. 133; *Mussey v. Raynor*, 22 Pick. 223. In all these cases the courts held that notice of acceptance is an essential element, without which a guaranty of future advances cannot rise higher than a mere proposal or offer, nor ascend to the rank of a binding agreement.

A letter, in the following words, was addressed to the owner of a horse: "M. will probably call on you to purchase your horse; and should you conclude to sell, you can do so. Take his note, and I will be responsible for the payment on his return." The horse was sold to M.; his note given, and not



An absolute present guaranty, complete in its terms, takes effect as soon as it is acted upon, without notice of acceptance.<sup>1</sup> Thus, a guaranty "that the within named

paid; and it was held that before the vendor could recover against the guarantor, he must prove that he gave the guarantor notice that he had sold on the faith of his guaranty, and that he looked to him for payment. *Smith v. Anthony*, 5 Mo. 504.

A. signed the following letter of credit to B.: "Mr. C. proposes to purchase some supplies of you. In case you should let him have them, I will see the amount of his account with you paid, to the amount of \$400." In an action on this guaranty, it was held that A. was entitled to notice that it was accepted and acted upon by B. *Montgomery v. Kellogg*, 43 Miss. 486.

<sup>1</sup> *Bright v. McKnight*, 1 Sneed. (Tenn.) 158. If, upon a fair construction of the terms of a written obligation, the contracting party undertakes to be responsible for goods to be sold to a third person, the contract will be regarded as an absolute guaranty; and, if acted upon in accordance with its terms, will bind the guarantor without notice of its acceptance or of its having been acted upon. *Powers v. Bumcratz*, 12 Ohio (N. S.), 273. If A. and B. promise to pay C. for all goods or money advanced by him to A., B. will be liable on his agreement without notice of acceptance. *Maynard v. Morse*, 36 Vt. 617. A guaranty of the payment of the moneys arising on any sales to be made to a third person, delivered by the guarantor to the vendor, is binding on the guarantor, without formal notice of the acceptance of the guaranty or of each sale as made. *Paige v. Parker*, 8 Gray (Mass.), 211. A guaranty in the following form: "We hereby guarantee the payment of all the debts heretofore made, and now outstanding against said company, and bind ourselves personally for the payment of the same to all the creditors of the company who will not sue, but indulge the company, upon these claims for ten months from this time," is a present absolute guaranty, upon which the guarantors are liable to a creditor granting such indulgence without notice of his acceptance of the guaranty. *Saunders v. Etcherson*, 36 Ga. 404.

Guaranties in the following form: "I want you to sell S. a bill of goods, and I will guarantee the payment of every dollar" (*Yancey v. Brown*, 3 Sneed, 89); or, "if you will let A. have \$100 worth of goods on three months' credit, you may consider me as guaranteeing the same" (*Smith v. Dunn*, 6 Hill, 543); or, "We consider E. good for all he may want of you, and we will indemnify the same" (*Whitney v. Groot*, 24 Wend. 82); or, "I will sign the note with H. for the cow bought of W." (*Carman v. Elledge*, 40 Iowa, 409); or, "If D. purchases a case of tobacco on credit, I agree to see the same paid for in four months" (*Chase v. Howard*, 41 Iowa, 479), are all absolute guaranties, and need no notice of acceptance.

Where A. writes to B., who desires to purchase goods from A., that if C. will guarantee the payment he will sell B. the goods; and C. writes to A. in reply, that he will guarantee, no further notice of the acceptance is necessary. *Cooke v. Orne*, 37 Ill. 186.

shall well perform the written contract," is binding on the guarantor as soon as it is acted upon, and no notice of acceptance is required to fix the liability.<sup>1</sup> So, where the guarantor and creditor reside in the same city, and an agreement to accept a guaranty is contemporaneous with the guaranty, no notice of acceptance of the offer, or that credit has been given on the faith of it, is necessary to render the offer absolute.<sup>2</sup>

SECTION 2.—*Notice of advances made.*

If the contract of the guarantor be for advances to be made on the happening of future contingencies, which may or may not happen, in addition to the general notice of acceptance of the guaranty and a purpose to act on its faith and credit, it may be necessary to advise the guarantor of the occurrence of the contingencies and the advances made, for, otherwise, he might not know whether any use were made of the guaranty, and might for this reason lose opportunity to obtain indemnity from the principal debtor.<sup>3</sup> It has been declared, in reference to a continuing guaranty for acceptances, indorsements and credits, that it was but reasonable, when the whole transactions were ended, notice of the amount claimed from the guarantor should be given within a reasonable time afterward.<sup>4</sup> But it is also held, that where the law requires that notice of the acceptance of a guaranty, and of an intention to act under it, shall be given to the guarantor, it does not require that notice be given him of each sale as made.<sup>5</sup>

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<sup>1</sup> Bright v. McKnight, 1 Sneed (Tenn.), 158.

<sup>2</sup> Calmzac v. Samini, 29 Ala. 288; Wilds v. Savage, 1 Story, 22; Walker v. Forbes, 25 Ala. 139.

<sup>3</sup> Cramer v. Higginson, 1 Mason, 323.

<sup>4</sup> Douglass v. Reynolds, 7 Pet. 113.

<sup>5</sup> Lowe v. Beckwith, 14 B. Mon. (Ky.) 184.

### SECTION 3.—*Waiver of notice of acceptance.*

Where the guarantor, by the terms of his contract, undertakes to pay, on receiving reasonable notice of the failure of the principal debtor to pay, this amounts to a waiver of notice of acceptance of the guaranty, if such notice is required by law.<sup>1</sup> A letter recognizing liability on a prior guaranty, and promising to make it good, is a waiver of notice of acceptance;<sup>2</sup> and where a loan has been made on the written request of a third person, who promises to hold himself responsible therefor, if he subsequently acquires full knowledge that the loan has been made, and with such knowledge approves of the loan and assents thereto, he will be bound by his guaranty, although no notice of acceptance be given him.<sup>3</sup> If the acts and declarations of the guarantor amount to a waiver of notice of acceptance, he cannot invoke the principle that such notice must be given in a reasonable time to fix his liability.<sup>4</sup>

### SECTION 4.—*Character of the notice required.*

A guarantor, when entitled to notice of acceptance of his guaranty, is not entitled to immediate, but to reasonable, notice.<sup>5</sup> As to what is a reasonable time must depend on the circumstances of the case, and no precise rule can be laid down by the courts.<sup>6</sup> Generally speaking, the question whether proper notice has been given is one of fact, to be determined by the jury upon consideration of the relative situation of the parties and all the attend-

<sup>1</sup> Wadsworth v. Allen, 8 Gratt. 174.

<sup>2</sup> Farwell v. Sully, 38 Iowa, 387.

<sup>3</sup> Central Savings Bank v. Shine, 48 Mo. 456; S. C. 8 Am. R. 112.

<sup>4</sup> Trefethen v. Locke, 16 La. Ann. 19.

<sup>5</sup> Louisville Manuf. Co. v. Welsh, 10 How. (U. S.) 461.

<sup>6</sup> Howe v. Nichols, 22 Me. 178.

ing circumstances, under proper instructions from the court.<sup>1</sup>

It was formerly held that notice of an intention to accept and act under a guaranty was an obligation of the commercial rather than the common law, and that it must be given immediately, or at least without unnecessary delay; but that rule is no longer recognized. The most that is required is that the notice shall be given within a seasonable or reasonable time, after what is called "acceptance."<sup>2</sup>

The law does not require that this notice shall be given in any precise form of words, nor in writing;<sup>3</sup> and if the fact that the creditor has accepted the guaranty and given credit on the faith of it, is seasonably made known to the guarantor in any manner, no express notice of acceptance is necessary.<sup>4</sup> The notice may be inferred from facts and circumstances.<sup>5</sup>

#### SECTION 5.—*Notice to guarantor of default of principal.*

The question as to whether notice of the default of the principal debtor is necessary to fix the liability of the guarantor, has given rise to numerous and conflicting decisions, which it would be idle to attempt to harmonize.

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<sup>1</sup> Lowry v. Adams, 22 Vt. 160; Walker v. Forbes, 25 Ala. 139; Lawrence v. McCalmont, 2 How. (U. S.) 426; Williams v. Staton, 5 Sm. & M. 347; Louisville Manuf. Co. v. Welsh, *supra*. Where one person agrees to endorse any paper which another person may give for purchases made to a certain amount each month, no liability arises until the purchases have been made and the notes given, or requested to be given, or unless notice of the purchases has been given to the guarantor within a reasonable time. A delay of nearly four months is unreasonable. Schlessinger v. Dickinson, 5 Allen (Mass.), 47.

<sup>2</sup> Douglass v. Reynolds, 7 Pet. 113; Central Savings Bank v. Shine, 48 Mo. 456; Montgomery v. Kellogg, 43 Miss. 486.

<sup>3</sup> Montgomery v. Kellogg, 43 Miss. 486; Oaks v. Waller, 16 Vt. 70; Reynolds v. Douglass, 12 Pet. 496.

<sup>4</sup> Train v. Jones, 11 Vt. 444.

<sup>5</sup> Montgomery v. Kellogg, 43 Miss. 486.

For the rule of law in any State determining this question, the reported decisions of that State must be the guide.

In New York, the courts have held that where the guaranty is for the payment of a note or other obligation, the undertaking is not conditional but absolute that the maker will pay the note when due; that it is no part of the agreement that the creditor shall give notice of non-payment, nor that he should sue the maker, or use any diligence to get the money from him; and that when the maker fails to pay the guarantor's contract is broken, and the creditor has a complete right of action against him.<sup>1</sup> And it is laid down as a general rule in that State that a guarantor is not entitled to notice of default of his principal;<sup>2</sup> that if he engages absolutely to pay he is liable, without demand upon the principal debtor;<sup>3</sup> and if he covenants for the performance of the contract of another, he is liable to the covenantee without notice of non-performance by the principal.<sup>4</sup> In Ohio, it is held that where a guaranty is dependent on some condition or contingency, expressed or fairly implied from the terms of the contract of guaranty, a compliance with those terms on the part of the guarantee is necessary, and must be alleged and proved in order to recover upon it. But where the guaranty of payment is absolute and unconditional it is not necessary, in order to make out a *prima facie* case for recovery, to aver or prove either demand or notice.<sup>5</sup>

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<sup>1</sup> Brown v. Curtis, 2 N. Y. 225.

<sup>2</sup> Barhydt v. Ellis, 45 N. Y. 107; Van Rensselaer v. Miller, Hill & Denio Supp. 237.

<sup>3</sup> Mann v. Eckford, 15 Wend. 502.

<sup>4</sup> Douglass v. Howland, 24 Wend. 35; Whitney v. Groot, 24 Wend. 82; Rushmore v. Miller, 4 Edw. Ch. 84.

<sup>5</sup> Clay v. Edgerton, 19 Ohio St. 549; s. c. 2 Am. R. 422; *citing*, Bashford v. Shaw, 4 Ohio St. 266; Allen v. Rightmere, 20 Johns. 365; Brown v. Curtis, 2 N. Y. 225; Breed v. Hillhouse, 7 Conn. 523; Read v. Cutts, 7 Greenl. 186; Heaton v. Hulbert, 3 Scam. (Ill.) 489.

In a recent case in Indiana, the court, in pointing out the difference between contracts of guaranty and suretyship, says: "The contract of a guarantor is his own separate contract; it is in the nature of a warranty by him that the thing guaranteed to be done by the principal shall be done, not merely an engagement jointly with the principal to do the thing. A guarantor, not being a joint contractor with his principal, is not bound to do what his principal has contracted to do, like a surety, but only to answer for the consequences of the default of the principal. The original contract of the principal is not his contract, and he is not bound to take notice of its non-performance, and therefore the creditor should give him notice; and it is universally held that if the guarantor can prove that he has suffered damage by the failure to give such notice, he will be discharged to the extent of the damage thus sustained."<sup>1</sup> These remarks were not necessary to the decision of the case, as the contract at bar was held to be one of suretyship; but by the decisions of that State a guarantor is entitled to notice of default of the party, the performance of whose contract he has guaranteed.<sup>2</sup>

In Illinois, it is laid down as a general rule that where one guarantees the act of another, his liability is commensurate with that of his principal, and that he is no more entitled to notice of default than the latter. Both must take notice of the whole at their peril.<sup>3</sup>

It may be laid down as a general rule that in case of an absolute guaranty, the guarantor is not entitled to demand, or notice of non-performance.<sup>4</sup> But where the

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<sup>1</sup> *McMillan v. Bulls Head Bank*, 32 Ind. 11; S. C. 2 Am. R. 323.

<sup>2</sup> *Gaff v. Sims*, 45 Ind. 262.

<sup>3</sup> *Gage v. Lewis*, 68 Ill. 604.

<sup>4</sup> *Dickerson v. Derrickson*, 39 Ill. 574; *Gage v. Mechanics' Nat. Bank of Chicago*, 79 Ill. 62; *Voltz v. Harris*, 40 Ill. 155; *Gammell v. Parramore*, 58

undertaking is collateral and not absolute, notice must be given in a reasonable time,<sup>1</sup> unless circumstances exist which will excuse the want of notice.<sup>2</sup> If the principal is insolvent when the debt becomes due or default is made, so that no benefit could be derived by the guarantor from the receipt of notice, no notice is required.<sup>3</sup>

### SECTION 6.—*What notice is required.*

The law does not demand the same strictness as to the time of notice that is required to change an indorser on negotiable paper; but it does require that the notice shall be given within a reasonable time.<sup>4</sup> What is a reasonable notice of default, is a question of fact for the jury.<sup>5</sup> In the United States courts it is held that notice

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Ga. 54; *Bowman v. Curd*, 2 Bush (Ky.), 565; *Barker v. Scudder*, 56 Mo. 272; *McDougal v. Calef*, 34 N. H. 534; *Taucy v. Brown*, 3 Sneed (Tenn.), 89; *Woodstock Bank v. Downer*, 1 Williams (Vt.), 482, 539; *Beebe v. Dudley*, 6 Foster (N. H.), 249; *Powers v. Bumcratz*, 12 Ohio (N. S.), 273; *Brown v. Curtis*, 2 N. Y. 225; *Mathews v. Christman*, 12 S. & M. 595; *Williams v. Springs*, 7 Ired. 384; *Skofield v. Haley*, 9 Shep. 164; *Carson v. Hill*, 1 M'Mullan, 76; *Cooper v. Page*, 11 Shep. 73; *Train v. Jones*, 11 Vt. 444; *Lane v. Levillian*, 4 Pike, 76; *Sibley v. Stull*, 3 Green, 332.

<sup>1</sup> *Beebe v. Dudley*, 6 Foster (N. H.), 249; *McDougal v. Calef*, 34 N. H. 534; *McCollum v. Cushing*, 22 Ark. 540; *Patterson v. Reed*, 7 Watts & S. 144; *Greene v. Dodge*, 2 Ohio, 231.

<sup>2</sup> *Virden v. Ellsworth*, 15 Ind. 144; *March v. Putney*, 56 N. H. 34.

<sup>3</sup> *Walker v. Forbes*, 25 Ala. 139; S. C. 31 Ala. 9; *Beebe v. Dudley*, 6 Foster (N. H.), 249; *Salem Manufacturing Co. v. Brower*, 4 Jones Law (N. C.), 429; *Cahuzac v. Samini*, 29 Ala. 288; *Skofield v. Haley*, 9 Shep. 164; *Maybury v. Baniton*, 2 Harring. 24; *Wildes v. Savage*, 1 Story, 22; *Montgomery v. Kellogg*, 43 Miss. 486; S. C. 5 Am. R. 508; *Warrington v. Furber*, 8 East. 242; *Van Wirt v. Wilkins*, 3 Barn. & Cress. 439-447; *Brackett v. Rich*, 23 Minn. 485.

<sup>4</sup> *Cahuzac v. Samini*, 29 Ala. 288; *Talbot v. Gay*, 18 Pick. 534; *Dole v. Young*, 24 Pick. 250; *Green v. Thompson*, 33 Iowa, 293; *Montgomery v. Kellogg*, 43 Miss. 486.

<sup>5</sup> *Wadsworth v. Allen*, 8 Gratt. 174; *Jackson v. Yandes*, 7 Blackf. 526. But see *Montgomery v. Kellogg*, 43 Miss. 486; S. C. 5 Am. R. 508; *Craig v. Parkis*, 40 N. Y. 181. See *Howe v. Nichols*, 22 Me. 178; *Wilds v. Savage*, 1 Story, 22.

to the guarantor of the non-payment of the debt guaranteed, must be given within a reasonable time,<sup>1</sup> unless the want of notice is excused. This is also the law in Louisiana,<sup>2</sup> Massachusetts<sup>3</sup> and Pennsylvania.<sup>4</sup>

Notice and demand on the guarantor at any time before action brought, is sufficient, if the guarantor has not been prejudiced by the want of notice,<sup>5</sup> and if he has he will be discharged only to the extent of the damage sustained.<sup>6</sup>

In England, one who indorses his name in blank upon a note to which he is not a party before its delivery is deemed a guarantor, and his contract is that the maker will pay the note at maturity, or, if he does not, the guarantor will. No demand or notice is considered necessary as a condition precedent to fixing the liability of the guarantor, or to the commencement of an action against him; but a failure to make demand and give notice, together with proof of injury, is *pro tanto* a defense.<sup>7</sup>

If a guarantor in his contract expressly waive demand and notice, he is, of course, liable thereon without previous demand or notice.<sup>8</sup>

In Iowa, under the code, a guarantor by a non-negotiable written contract is not entitled to notice before action.<sup>9</sup>

<sup>1</sup> Dunbar v. Brown, 4 McLean, 166; Hawk v. Crittenden, 2 McLean, 557; Fort v. Brown, Id. 369; Lewis v. Brewster, Id. 21.

<sup>2</sup> McGuire v. Newkirk, 1 Eng. 142.

<sup>3</sup> Clark v. Remington, 11 Met. 361; Whiton v. Mears, Id. 563.

<sup>4</sup> Gibbs v. Connor, 9 Serg. & R. 198; Isett v. Hoge, 2 Watts, 128.

<sup>5</sup> Babcock v. Bryant, 12 Pick. 133; Salsbury v. Hale, Id. 416.

<sup>6</sup> Reynolds v. Douglass, 12 Pet. 497; Union Bank v. Coster's Executors, 3 N. Y. 203, 213.

<sup>7</sup> See Wilds v. Savage, 1 Story, 22; Howe v. Nichols, 22 Me. 178; Jones v. Goodwin, 39 Cal. 493; S. C. 2 Am. R. 473.

<sup>8</sup> Bickford v. Gibbs, 8 Cush. 154.

<sup>9</sup> Henderson v. Booth, 11 Iowa, 212.



In Michigan, it has been held that no general rule can be laid down in respect to demand and notice in case of guarantors ; but where, from the terms of the guaranty or the facts disclosed in a given case, demand and notice are required, the omission of the demand and notice is not available as a defense unless the guarantor, by reason of the omission, has suffered loss or damage.<sup>1</sup>

And in all cases where notice is required, it need not be in any precise form, nor even in writing, but may be inferred from facts and circumstances.<sup>2</sup>

SECTION 7.—*Notice to surety of default of principal.*

As was stated in the introductory chapter of this volume, there is a marked distinction between the legal rights and liabilities of guarantors and sureties, although it is not always easy to determine to which class of contracts the undertaking under consideration belongs.

A surety is bound with his principal as an original promisor ; he is a debtor from the beginning, and must see that the debt is paid, and is held ordinarily to know every default of his principal, and cannot protect himself by the mere indulgence of the creditor, nor by want of notice of the default of his principal, however much such indulgence or want of notice may, in fact, injure him.<sup>3</sup>

Thus, if a principal and his sureties execute a bond obligating the principal to build a bridge according to certain plans and specifications, and providing that the bridge shall stand and remain for four years, and the

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<sup>1</sup> Farmers' & Mechanics' Bank *v.* Kercheval, 2 Mich. 504.

<sup>2</sup> Reynolds *v.* Douglass, 12 Pet. 496 ; Oaks *v.* Weller, 16 Vt. 70 ; Montgomery *v.* Kellogg, 43 Miss. 486.

<sup>3</sup> Central Savings Bank *v.* Shine, 48 Mo. 456 ; s. c. 8 Am. R. 112 ; McMillan *v.* Bulls Head Bank, 32 Ind. 11 ; s. c. 2 Am. R. 323 ; Pittsburg, &c. R. R. Co. *v.* Sheaffer, 59 Penn. St. 350 ; Harris *v.* Newell, 42 Wis. 687.

bridge gives way and becomes unfit for use in less than two years, no notice to the sureties is required to hold them responsible on their obligation.<sup>1</sup>

The sureties upon a bond given by an employee to his employer, conditioned that the employee will faithfully account for all moneys and property of his employer coming into his hands, are not discharged from subsequent liability by an omission on the part of the employer to notify them of a default on the part of such employee known to the employer, and a continuance of the employment after the default, in the absence of evidence of fraud and dishonesty on the part of the employee.<sup>2</sup> But the rule is otherwise where the default is of a nature indicating want of integrity, in the employee, and this is known to the employer.<sup>3</sup> The English authorities, especially those of a recent date, go far to uphold the position that the employer is bound to notify those who have become guarantors for the faithful discharge of the duties which the employee has assumed to perform, of any defalcation or dishonesty on the part of the employee. Where there was a continuing guaranty of the honesty of a servant, and the master discovered that the servant had been guilty of dishonesty in the course of the service, and, instead of dismissing him, chose to continue him in his employ without the knowledge and consent of the surety, express or implied, it was held that he could not afterwards have recourse to the surety to make good any loss from the dishonesty of the servant during the subsequent service.<sup>4</sup>

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<sup>1</sup> *Buchanan County v. Kirtley*, 42 Mo. 534.

<sup>2</sup> *Atlantic & Pacific Tel. Co. v. Barnes*, 64 N. Y. 385; S. C. 21 Am. R. 621.

<sup>3</sup> *Id.*

<sup>4</sup> *Phillips v. Foxall*, L. R. 7 Q. B. 666. See *Sanderson v. Aston*, L. R. 8 Exch. 73; *Burgess v. Eve*, L. R. 13 Eq. 450, 458; *Montague v. Tidcomb*, 2 Vern. 518.

## CHAPTER XI.

### WHEN THE CONTRACT CREATES NO LIABILITY.

SECTION 1. Where there is no legal delivery.

2. Where the contract was procured by fraud.
3. Where the contract was obtained by duress.
4. Where the contract was revoked before acted upon.

SECTION 1.—*Where there is no legal delivery.*

There is a broad distinction between contracts of guaranty or suretyship upon which, for some reason, the guarantor or surety never became liable, and similar contracts, upon which a liability once existed, but for reasons recognized by the law has ceased to exist.

Thus a contract of guaranty or suretyship may be so drawn, that if certain conditions are not observed and complied with the liability of the surety or guarantor never attaches;<sup>1</sup> or it may be so drawn that the liability will cease on the happening of certain events. The execution of the contract may be upon certain express conditions; and it will be found that the execution and delivery of these contracts to the principal obligor, on express conditions never complied with, has been a fruitful source of litigation, and that the rule as to the respective rights of the surety and the obligee in such cases is not well settled.

Thus, it is held in one class of cases that if a surety executes a bond and delivers it to the principal obligor, to enable him to procure the signature of an additional

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<sup>1</sup> See *Talmadge v. Williams*, 27 La. Ann. 653; *Clay v. Edgerton*, 19 Ohio St. 549; s. c. 2 Am. R. 422; *Hunt v. Smith*, 17 Wend. 179.

surety, and on the express condition that it is not to be the bond of the surety, nor delivered to the obligee, until such signature is obtained, and the principal debtor nevertheless delivers such bond without complying with the condition, after forging the name of the additional surety thereto, the bond is void as to the surety executing it.<sup>1</sup>

These decisions are placed upon the ground that there was no valid execution of the bond; that the delivery was conditional; and that it could not become the bond of the surety until the condition was performed.<sup>2</sup>

On the other hand, it has been held that where a party was asked to sign a note as surety, but refused, unless another person named would first execute the same, and the principal thereupon forged the signature of the other person, and thereby procured the signature of the person first requested to sign the note, as surety, the instrument was a valid obligation in the hands of an innocent party, from whom the principal procured money on the faith of the note, and who had no notice of the fraud.<sup>3</sup>

These decisions rest on the well-known principle, that where one of two innocent persons must be a loser by the deceit or fraud of another, the loss must fall on him who employs and puts trust and confidence in the deceiver, and not on the other.

The same principle has also been applied in cases

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<sup>1</sup> *Linn County v. Farris*, 52 Mo. 75; S. C. 14 Am. R. 389; *Seely v. People*, 27 Ill. 173; *Chamberlin v. Beaver*, 3 Bush. (Ky.) 561.

<sup>2</sup> *Linn County v. Farris*, 52 Mo. 75. *Citing*, *State v. Sandusky*, 46 Mo. 377; *Gasconade County v. Sanders*, 49 Mo. 192; *Briggs v. Ewart*, 51 Mo. 245; *Cotter v. Whittemore*, 10 Mass. 442; *Pepper v. State*, 22 Ind. 399; *Bagot v. State*, 33 Ind. 262; *People v. Bostwick*, 32 N. Y. 445; *Pawling v. United States*, 4 Cranch, 219; *Duncan v. United States*, 7 Peters, 435; *United States v. Leffler*, 11 Pet. 86; *Seely v. People*, 27 Ill. 175.

<sup>3</sup> *Stoner v. Milliken*, 85 Ill. 218. And see *York Manufacturing Co. v. Brooks*, 51 Me. 506; *Selser v. Brock*, 3 Ohio St. 302; *Bigelow v. Comegys*, 5 Ohio, 256.

where a surety has intrusted a bond to the principal debtor, with the understanding, and upon the express condition, that it should not be binding upon the surety, or delivered to the obligee, until it had been executed by another person as surety, and the principal obligor has, nevertheless, delivered the bond, to all appearance a perfect instrument, to the obligee, without complying with the condition, and without giving notice of its existence.<sup>1</sup>

There is a distinction made in the cases between the delivery of an instrument, in all respects complete upon its face, in violation of an express condition, and such delivery of an instrument carrying with and upon it marks of incompleteness that should put the obligee upon inquiry.

Thus, if persons are named in the body of the bond, as sureties, who have not executed it, and it is in that condition delivered by the principal obligor, in violation of an express condition that the instrument should not be delivered until signed by all persons named therein, it will not be binding on those who conditionally delivered it to the principal debtor for completion.<sup>2</sup> So, if the bond, on its face, purports to be executed by the principal obligor, but is not signed by him, and is executed and delivered by a surety on the express condition that the principal was to join in it, the bond will be void, if delivered without the signature of the principal.<sup>3</sup> And where it is agreed, between all the parties to an obligation, that it shall not be valid unless executed by all of certain persons, it is not valid unless so executed,<sup>4</sup> unless

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<sup>1</sup> *Barr v. United States*, 16 Wall. 1; *Russell v. Freer*, 56 N. Y. 67.

<sup>2</sup> *Pawling v. United States*, 4 Cranch, 219; *Ward v. Churn*, 18 Ill. 801; *Preston v. Hull*, 23 Gratt. 600; S. C. 14 Am. R. 153.

<sup>3</sup> *Hall v. Parker*, 37 Mich. 590; S. C. 26 Am. R. 540.

<sup>4</sup> *State v. Lewis*, 73 N. C. 138; S. C. 21 Am. R. 461.

it be afterwards delivered absolutely to the obligee by a part of the proposed obligors only, in which case it may be binding on them.<sup>1</sup>

It has been held, that where a bond is put in the hands of the obligee, or any other person, on the condition that it should not become obligatory until the performance of some act by the obligee, or any other person, the instrument does not become the bond of the party signing it until the condition precedent be performed. Until then there is no contract.<sup>2</sup> Thus, where a bank, for the purpose of obtaining a loan, executed a bond, with sureties, conditioned that the bank should repay the money borrowed, and the sureties who signed the bond delivered it to the president of the bank, with the distinct understanding that it should not be used until it should be signed by another person as co-surety, it was held that the delivery of the bond, without the signature of the other person as co-surety, was a nullity, and that the sureties were not liable.<sup>3</sup> So, where a surety signed an injunction bond, and delivered it to the principal, on condition that it was not to be delivered to the obligee unless certain others also signed it as sureties, it was held that the delivery of the bond by the principal, in violation of the condition, created no liability.<sup>4</sup>

It is a general principle that every person competent to act for himself has a right to decide with whom he will enter into contract relations, and may make the introduction or exclusion of any other person a condition of his joining, and whatever may be his reasons for in-

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<sup>1</sup> *State v. Peck*, 53 Me. 284.

<sup>2</sup> *Lovett v. Adams*, 3 Wend. 380; *Bronson v. Noyes*, 7 Wend. 188.

<sup>3</sup> *People v. Bostwick*, 32 N. Y. 445; S. C. 43 Barb. 9. This decision has been questioned in the courts of other States (*Nash v. Fergate*, 24 Gratt. 202; *State v. Potter*, 63 Mo. 212), and it may be doubted if it is now an authority in the court in which it was rendered. *Russell v. Freer*, 56 N. Y. 67.

<sup>4</sup> *Guild v. Thomas*, 54 Ala. 414; S. C. 25 Am. R. 703.

sisting on the condition, he is not required to submit their validity to a court or jury.<sup>1</sup> It has also been held, that one who signs a covenant as surety, upon the condition and agreement between him and the principal, that it is not to be binding upon him, or delivered to the covenantee, unless another person shall also sign it, is bound thereby, although the principal, to whom he intrusted it, delivered it to the covenantee without a compliance with such a condition, of which condition and its breach the covenantee had notice.<sup>2</sup> But this case is contrary to the current of authority, and it is almost universally held, that where the obligee has notice of the condition attending the delivery of the instrument to the principal obligor, or is chargeable with notice of the condition and its breach, the surety is not bound.<sup>3</sup>

In respect to the effect of a breach of an express condition upon which a bond or other obligation was delivered to the principal obligor, the cases are very conflicting, and, in most cases, the decisions of the highest courts in several States are inconsistent with other decisions of the same courts in the same States. The current of the later decisions is to the effect, that where a surety places an instrument, perfect on its face, in the hands of the proper person, to pass it to the obligee, the law justly holds, that the apparent authority with which the surety has clothed him shall be regarded as the real authority; and as the condition imposed upon the delivery was unknown to the obligee, therefore the benefit of such condition shall not avail the surety.<sup>4</sup>

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<sup>1</sup> *Hall v. Parker*, 37 Mich. 500; S. C. 26 Am. R. 540; *Humble v. Hunter*, 12 Q. B. 311; *Winchester v. Howard*, 97 Mass. 303; *Boston Ice Co. v. Potter*, 123 Mass. 28; S. C. 25 Am. R. 9.

<sup>2</sup> *Millett v. Parker*, 2 Metc. (Ky.) 608.

<sup>3</sup> *Herdman v. Bratten*, 2 Harr. 396; *Bronson v. Noyes*, 7 Wend. 188; *Fletcher v. Austin*, 11 Vt. 447; *Johnson v. Baker*, 4 B. & Ald. 440.

<sup>4</sup> *Russell v. Freer*, 56 N. Y. 67; *State v. Potter*, 63 Mo. 212; *Nash v.*

But while the courts recognize the principle that where a fraud has been perpetrated, from which one of two innocent parties must suffer, he who put it in the power of a third person to commit the fraud must bear the loss, they require that the party invoking this principle must be without fault himself; that where the instrument upon which it is sought to charge the surety is an official bond, or a bond taken and approved in the course of judicial proceedings, the principle does not apply as against the surety; that the officer taking and approving the bond does not exercise due diligence unless the bond is signed in his presence and delivered to him by all the obligors, or by some one having authority in writing properly attested, to bind them; that if such diligence is not observed, the officer must bear the consequence of his neglect; and if the negligence of the officer involves loss to individuals for which the officer is not able to respond, the loss ought not to be thrown on those who have not consented to bear it.<sup>1</sup> So, if the bond delivered bears on its face evidence that it is an incomplete instrument,<sup>2</sup> or there is something in the attendant circumstances showing knowledge,

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Fugate, 24 Gratt. 202; *Dair v. United States*, 16 Wall. 1; *Smith v. Peoria County*, 59 Ill. 412; *State v. Peck*, 53 Me. 284. And see *ante*. p. 100.

<sup>1</sup> *Guild v. Thomas*, 54 Ala. 414; S. C. 25 Am. R. 703. In *Spitler v. James*, 32 Ind. 202, it was held that an obligee may properly accept, without inquiry, an instrument, perfect in form and execution, which comes to him from the person who should have possession of the instrument for the purpose of such delivery; that the surety who executed the instrument, and placed it in the usual channel for delivery, cannot limit the general authority by a condition of which the obligee has no notice; that if the condition be disregarded and a fraud accomplished, he who has clothed his principal with the semblance of a general authority to make the delivery must stand the hazard he has incurred. See, also, *Quinn v. Hard*, 43 Vt. 375.

<sup>2</sup> *Pawling v. United States*, 4 Cranch, 218; *State v. Pepper*, 31 Ind. 76; *Herdman v. Bratten*, 2 Harr. 396; *Fletcher v. Austin*, 11 Vt. 447; *Johnson v. Baker*, 4 B. & Ald. 440; *Ward v. Churn*, 18 Gratt. 801; *Preston v. Hall*, 23 Gratt. 600; S. C. 14 Am. R. 153.



or its equivalent, on the part of the recipient, that the instrument was not to be delivered until other signatures were obtained or other acts done of equal importance,<sup>1</sup> the delivery of the instrument will create no liability as against one who executed it on the express condition that it should not be delivered to the obligee until the instrument was complete, or the other signatures obtained, or other stipulated acts done.

But the doctrine of estoppel which has been before mentioned,<sup>2</sup> has no application where the bond is delivered to or by a stranger to the contract, and not to or by a co-obligor. In such cases, the person to whom the bond is delivered is a mere special agent, having no apparent authority to deliver it to the obligee, and the latter must take notice of his authority at his peril.<sup>3</sup>

If a surety, before signing a bond, stipulates that it shall be placed in the possession of a third party, and shall not be delivered to the obligee until the principal obligor shall indemnify the surety against the risk, the surety will not be liable on the bond if it is prematurely delivered.<sup>4</sup>

So, where a person signs a non-negotiable promissory note as surety, upon the express condition that a third

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<sup>1</sup> Leaf v. Gibbs, 4 C. & P. 466. See *ante*. p. 102.

<sup>2</sup> See *ante*. p. 99.

<sup>3</sup> Nash v. Fugate, 24 Gratt. 202; 18 Am. R. 640. See *ante*. p. 100.

The distinction between a delivery of a bond to a stranger and to a co-obligor is not recognized in Alabama. In a late case the court says, "It can hardly be affirmed that it is a legal presumption, that an obligor having custody of the instrument, has authority to deliver it, when the same presumption would not be drawn from its custody by a stranger. Why it should be drawn in one case and not in the other, it seems to us difficult to assert on any sound reasoning. It may be that the obligee or others would be less reluctant to receive it without inquiry from a co-obligor than from a stranger; yet each must have the same authority if the instrument becomes valid with the consent of all who are to be bound." Guild v. Thomas, 54 Ala. 414; S. C. 25 Am. R. 703. See Bibb v. Reid, 3 Ala. 88.

<sup>4</sup> Whitsell v. Mebane, 64 N. C. 345.

person should sign it as co-surety, and delivers it to the maker upon the condition that it is not to be delivered to the payee until such signature is obtained, but the note is, nevertheless, delivered to the payee without such signature, and received by him in good faith and without notice of the condition, the surety will not be liable.<sup>1</sup> The rule would be otherwise, however, in case of negotiable or commercial paper.

SECTION 2.—*Where the contract was procured by fraud.*

It is a general rule that fraud vitiates all contracts; and contracts of guaranty and suretyship form no exception. But the fraud which will vitiate a contract of suretyship must be one to which the person benefited by the contract is a party, or at least of which he had notice.<sup>2</sup>

Wherever there is any misrepresentation, or even concealment from the surety, of any material fact which, if disclosed, might have prevented him from entering into the contract of suretyship, it will render it invalid, and the surety will not be liable.<sup>3</sup> But the obligee in a bond is not bound to seek out the sureties and explain to them the nature and extent of their obligation, at the point of losing the security, nor is he to be held responsible for the fraudulent representations or concealment of the principal of any of the facts. It is the duty of the sureties to look out for themselves and ascertain the nature of the obligation embraced in the undertaking, and any other rule would not only work serious inconvenience,

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<sup>1</sup> Ayres v. Milroy, 53 Mo. 516. And see Leaf v. Gibbs, 4 Car. & P. 466; Perry v. Patterson, 5 Humph. 133.

<sup>2</sup> Coleman v. Beam, 3 Keyes (N. Y.), 94; Casoni v. Jerome, 58 N. Y. 315; McWilliams v. Mason, 31 N. Y. 294.

<sup>3</sup> Graves v. Lebanon National Bank, 10 Bush (Ky.), 23; S. C. 19 Am. R. 50.

but render securities of this character of but little, if of any, value.<sup>1</sup>

Thus, if persons named as sureties in a bond of an administratrix with the will annexed, are ignorant, at the time of the execution, of the real nature of the administration, or if they have been misled or deceived by those at whose solicitation they executed it, as to the nature or degree of the responsibility they assumed, they cannot avail themselves of their ignorance, or of the deception practiced upon them, as a defense against the claims of persons for whose security the bond was taken, and who were in no way connected with the deception.<sup>2</sup> So, where the maker of a note, without the knowledge or participation of the payee, by fraudulent representations induces a third person to sign it as surety, the surety will be liable notwithstanding the fraud.<sup>3</sup> But the rule would be otherwise, if the payee in any manner participated in the fraud.<sup>4</sup>

A fraud may be perpetrated as well by an assertion of facts that do not exist, ignorantly made by one whom the person acting upon the assertion has the right to suppose has used reasonable diligence to inform himself, as by a concealment of facts known to exist which, in equity and good conscience, ought to be made known. And if a

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<sup>1</sup> *Western New York Life Ins. Co. v. Clinton*, 66 N. Y. 326. See *Wythes v. Labouchere*, De G. & Jo. 593; *Hamilton v. Watson*, 12 C. & F. 118; *North British Ins. Co. v. Lloyd*, 10 Exch. 523.

<sup>2</sup> *Casoni v. Jerome*, 58 N. Y. 315.

<sup>3</sup> *Anderson v. Warne*, 71 Ill. 20; S. C. 22 Am. R. 83; *McWilliams v. Mason*, 31 N. Y. 294.

<sup>4</sup> *Easter v. Minard*, 26 Ill. 494; *Young v. Ward*, 21 Ill. 223.

The courts say, that to enable a surety on a promissory note to succeed in a defense founded on a fraudulent concealment of a material fact, he must allege that the payee either procured the surety's signature, or was present when it was made, and then misrepresented or concealed the essential facts which he ought to have disclosed truly. *Burks v. Wonerline*, 6 Bush (Ky.), 20.

banking association, pursuant to the provisions of the law to which it owes its existence, ignorantly publish to the world a statement of its condition, from which it appears that its affairs were being prudently and honestly administered, and from which the public have a right to believe that the cashier of the association has, up to that time, acted as a trustworthy person, and thereby third persons are induced to become sureties for the diligence, honesty, and fidelity of the cashier, when, in fact, he had been guilty of repeated embezzlements and frauds, which might have been discovered by the association by the exercise of slight diligence, the sureties will not be liable on their contract for the cashier's subsequent embezzlements.<sup>1</sup>

There is no principle of law better settled, than that persons proposing to become sureties to a corporation for the good conduct and fidelity of an officer, to whose custody its moneys, notes, bills and other valuables are intrusted, have the right to be treated with perfect good faith. If the directors are aware of secret facts materially affecting and increasing the obligation of the sureties, the latter are entitled to have these facts disclosed to them, a proper opportunity being presented.<sup>2</sup> Or, as the principle is stated by Justice Story, "If a party, taking a guaranty from a surety, conceals from him facts which go to increase his risk, and suffers him to enter into the contract under false impressions as to the real state of facts, such concealment will amount to a fraud, because the party is bound to make the disclosure, and the omission to make it, under such circumstances, is equivalent to an affirmation that the facts do not exist."<sup>3</sup>

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<sup>1</sup> *Graves v. Lebanon National Bank*, 10 Bush (Ky.). 23; S. C. 19 Am. R. 50.

<sup>2</sup> *Morse on Banking*, 226.

<sup>3</sup> 1 Story's Eq. Jur. § 215. Where a person employed to sell goods on commission, and largely in arrear in returns of the proceeds of his sales, was

But, although a contract of guaranty or suretyship has been procured through false representations, if the surety or guarantor, with full knowledge of all the facts, but in ignorance of his legal rights, afterwards obtains an extension of time for payment, and as a consideration therefor promises payment, he will be liable, as these acts operate as a waiver of the defense.<sup>1</sup>

SECTION 3.—*Where the contract was obtained by duress.*

When a person is arrested without just cause, and from motives which the law does not sanction, every contract into which he may enter with the authors of the wrong, to procure his liberation from restraint, is imputed to illegal duress. It is corrupt from its origin, and the wrongdoer can take no benefit from its execution.<sup>2</sup> In all such cases it is the duty of the court to condemn the contract, and thus remit the parties to their antecedent rights.

Ordinarily, the defense of duress is available to the

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required to give a floating guaranty in a specified sum, and, at his request, a third person is induced to enter into a guaranty, in which the terms of the dealings between the parties is recited but the indebtedness is concealed, the guarantor may show, in an action on the guaranty, that the indebtedness was not communicated to him by the creditor in support of his plea, that he was induced to make the agreement through the fraudulent concealment by the creditor of a material fact. *Lee v. Jones*, 14 C. B. (N. S.) 322; 13 W. R. Exch. 318; 17 C. B. (N. S.) 482.

The rule, which is well established in respect to insurance of ships and lives, that all material circumstances known to the assured must be disclosed, though there is no fraud in the concealment, does not extend to guaranties. In the latter class of contracts the concealment, which will vitiate the guaranty, must be fraudulent. *North British Assurance Co. v. Lloyd*, 10 Exch. 523; 1 Jur. (N. S.) 45; 24 L. J. Exch. 14.

<sup>1</sup> *Rindskopf v. Doman*, 28 Ohio St. 516.

<sup>2</sup> *Strong v. Grannis*, 26 Barb. 123; *Osborn v. Robbins*, 36 N. Y. 365; *Edie v. Slimmon*, 26 N. Y. 9; *Richardson v. Duncan*, 3 N. H. 508; *Severance v. Kimball*, 8 N. H. 386; *Watkins v. Baird*, 6 Mass. 510; *Cumming v. Ince*, 11 Ad. & Ell. (N. S.) 112, 119; *Foshay v. Ferguson*, 5 Hill, 154.

surety who has joined in the contract, as well as to the principal therein.<sup>1</sup>

But it is not available as a defense to an action on a forfeited recognizance in a criminal action.<sup>2</sup>

SECTION 4.—*Where the contract was revoked before acted upon.*

An agreement to guarantee the payment by another of goods to be sold in the future, not founded upon any present consideration passing to the guarantor, imposes no obligation and creates no liability until it is acted upon; and until that time may be revoked by the guarantor.<sup>3</sup>

But the revocation should be clear and explicit; as the courts will not construe doubtful expressions in subsequent correspondence as a revocation of an explicit guaranty.<sup>4</sup>

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<sup>1</sup> Osborn v. Robbins, 36 N. Y. 365; Putnam v. Schuyler, 4 Hun, 166, 170; Strong v. Grannis, 26 Barb. 122; Thompson v. Lockwood, 15 Johns. 256.

<sup>2</sup> Plummer v. People, 16 Ill. 358; Huggins v. People, 39 Ill. 241.

<sup>3</sup> Jordan v. Dobbins, 122 Mass. 168; S. C. 23 Am. R. 305; Offord v. Davies, 12 C. B. (N. S.) 748; Durham v. Bischof, 47 Ind. 211.

<sup>4</sup> Lanusse v. Barker, 3 Wheat. 101.

## CHAPTER XII.

### DISCHARGE OF SURETIES OR GUARANTORS.

- Section 1.—Not discharged by mere forbearance.
- 2.—By neglect or refusal to sue after request.
  - 3.—By neglect to sue after the statutory notice has been given.
  - 4.—By want of diligence in the prosecution of the suit.
  - 5.—By failure to terminate the contract after default.
  - 6.—By release of co-surety or indorser.
  - 7.—By release of securities.
  - 8.—By extension of time of payment.
  - 9.—By implied contract for extension of time.
  - 10.—Consideration of agreements extending time.
  - 11.—Extension of time on usurious consideration.
  - 12.—Giving time to one of several sureties.
  - 13.—Giving time to principal, but reserving rights against the sureties.
  - 14.—Want of knowledge by the creditor of the existence of the relation.
  - 15.—By the taking of other or collateral security.
  - 16.—By alteration or merger of principal's contract.
  - 17.—By change of the duties of the principal debtor.
  - 18.—Tender by surety or principal.
  - 19.—By discharge of principal debtor.
  - 20.—By discharge, etc., of principal in bankruptcy.
  - 21.—By discharge of surety in bankruptcy.
  - 22.—By failure to present the claim against the principal's estate, etc.
  - 23.—By imprisonment of principal.
  - 24.—By act of God.
  - 25.—By performance of contract.
  - 26.—By marriage between the principal and creditor.
  - 27.—Consent of surety or guarantor.
  - 28.—Revival of liability after discharge.

#### SECTION I.—*Not discharged by mere forbearance.*

It is a general well settled rule of law, that mere indulgence, forbearance or delay on the part of a creditor towards the principal debtor, or the omission of the creditor to sue, will not discharge a surety<sup>1</sup> unless the cred-

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<sup>1</sup> McKechnie v. Ward, 58 N. Y. 541; Wright v. Watt, 52 Miss. 634; Clark

itor is under some obligation to sue,<sup>1</sup> or unless forbearance would prejudice the claim of the surety upon the principal, and thereby work his injury.<sup>2</sup> Mere passive negligence or laches of an obligee or creditor, mere non-performance of some affirmative act which, if performed, might prevent loss to the surety, will not, in the absence of some express agreement or condition to that effect, discharge a surety; and the neglect of duty which is available as a defense for a surety, must be of some duty owing to the surety and not to others; it must be some positive duty undertaken in behalf of and for the benefit of the surety.<sup>3</sup> The general rule is stated by Judge Story as follows: "If a creditor does any act injurious to the surety, or inconsistent with his rights, or if he omits to do any act when requested by the surety which his duty enjoins him to do, and the omission proves injurious to the surety, the latter will be discharged, and he may set up such conduct as a defense to any suit brought against him."<sup>4</sup> But before an omission of duty on the part of the creditor will operate to discharge a surety, the surety must intervene and request the performance of the duty.<sup>5</sup>

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*v. Sickler*, 64 N. Y. 231; *Hunter v. Clark*, 28 Texas, 159; *Schroeppell v. Shaw*, 3 N. Y. 446; *Buckalew v. Smith*, 44 Ala. 638; *McMullen v. Hinkle*, 39 Miss. 142; *Richards v. Commonwealth*, 40 Penn. St. 146; *Kirby v. Studebaker*, 15 Ind. 45; *Hunt v. Knox*, 34 Miss. 655; *Humphreys v. Crane*, 5 Cal. 173; *Carter v. Jones*, 5 Ired. Eq. 196; *King v. State Bank*, 4 Eng. 185; *Vason v. Beall*, 58 Ga. 500; *Mutual Life Ins. Co. v. Davies*, 12 Jones & Sp. 172; *Allen v. Brown*, 124 Mass. 77.

<sup>1</sup> *Board of Supervisors v. Otis*, 62 N. Y. 88; *Remsen v. Beekman*, 25 N. Y. 552.

<sup>2</sup> *McKechnie v. Ward*, 58 N. Y. 541; *Watts v. Shuttleworth*, 5 Hurl. & Nor. 235.

<sup>3</sup> See *Board of Supervisors v. Otis*, 62 N. Y. 88, 92.

<sup>4</sup> 1 Story's Eq. §§ 225, 226. See *Schroeppell v. Shaw*, 3 N. Y. 446, 462.

<sup>5</sup> *Clark v. Sickler*, 64 N. Y. 231; *Summerhill v. Tapp*, 52 Ala. 227; *Lumsden v. Leonard*, 55 Ga. 374. The fact that the creditor omitted some act not specially enjoined by law, or committed some act expressly authorized by law which tended to increase the risk of the surety, will not discharge the surety. *Stewart v. Barrow*, 55 Ga. 664.



Where the contract of the surety provides for the payment by the principal debtor of a single certain sum on a certain day, or a gross ascertained sum, in installments, on given days, no duty rests upon the creditor to insist upon and enforce payment from the principal debtor as the payments become due, nor will the omission merely of the creditor to insist upon and enforce such payments discharge the surety.<sup>1</sup> The surety has his remedy. He may himself pay the debt and sue instantly with all the chances which he can claim that the creditor has neglected. In the event of a loss, his own neglect is as much the cause as that of the creditor.<sup>2</sup> If the contract of the surety is not for the payment of a definite sum on a given day, but is for a continuing transaction, contemplating a recurring indebtedness, to be made and extinguished monthly, renewable as often and as soon as paid, it will not be discharged by mere forbearance on the part of the creditor to enforce payment as provided for in the contract, without a binding agreement for an extension of time.<sup>3</sup> The creditor is under no obligation of active diligence for the protection of the surety, as long as the surety himself remains inactive.<sup>4</sup> In order that the indulgence of the creditor shall have the effect of discharging the surety in such a contract, there must be something beyond the bare neglect of the creditor to enforce payment or performance from the principal; there must be some act of connivance or gross negligence amounting to willful shutting of the eyes to the fraud.<sup>5</sup>

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<sup>1</sup> *McKechnie v. Ward*, 58 N. Y. 541.

<sup>2</sup> *Herrick v. Borst*, 4 Hill, 650.

<sup>3</sup> *McKechnie v. Ward*, 58 N. Y. 541. See *Trent Navigation Co. v. Harley*, 10 East, 34; *London Assurance Co. v. Buckle*, 4 J. B. Moore, 153.

<sup>4</sup> *Schroepell v. Shaw*, 3 N. Y. 446, 457.

<sup>5</sup> *McKechnie v. Ward*, 58 N. Y. 541, 549. See *McTaggart v. Watson*, 3 Cl. & Fin. 529; *Dawson v. Laws*, 1 Kay, 280; *Douglass v. Howland*, 24 Wend. 35.

So firmly is the rule established, that no mere neglect to sue will discharge the surety, that, in New York at least, if the principal debtor offers to pay his debt to the creditor, and omits to do so only because the creditor requests him to retain the money, the surety will remain liable, notwithstanding the subsequent insolvency of the principal debtor, unless the surety has, by some request on his part, made it the duty of the creditor to proceed to collect his demand.<sup>1</sup>

In New York, and some of the other States, there is an important exception to this rule in cases of guaranties of collection. Where a guaranty of this nature has been entered into, no notice is necessary from the surety to the creditor, requiring the latter to proceed with due diligence to collect from the principal debtor. It is a condition precedent in such a case that the debtor shall diligently endeavor to collect the amount of the principal debtor, by exhausting the ordinary legal remedies for that purpose, and if he fails to do this the guarantor is discharged.<sup>2</sup> Thus it has been held that a delay of six months in foreclosing a mortgage after a payment became due, discharged the guarantor.<sup>3</sup>

In many of the other States the rule is less stringent, as has been shown; and the creditor is not required to exhaust his legal remedies against the principal, at the peril of discharging the guarantor of collection, in case the principal is clearly insolvent at the time payment becomes due. But in those States the creditor cannot sleep on his rights. He must use due diligence against

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<sup>1</sup> *Clark v. Sickler*, 64 N. Y. 231. See *Banner v. Nelson*, 57 Ga. 433; *Sears v. Van Dusen*, 25 Mich. 351.

<sup>2</sup> *Northern Ins. Co. v. Wright*, 13 Hun, 166; s. c. 76 N. Y. 445; *McMurray v. Noyes*, 72 N. Y. 523; *Russell v. Weinberg*, 53 How. 468; *French v. Marsh*, 29 Wis. 649. And see *ante*, p. 139.

<sup>3</sup> *Craig v. Parkis*, 40 N. Y. 181.

the principal debtor in an attempt to collect the demand, or be in a condition to show that through the insolvency of the principal debtor an attempt to collect the demand from him would be fruitless, and that the guarantor has consequently lost nothing by the delay.<sup>1</sup>

But mere inaction of a creditor will not discharge from liability one who unconditionally guarantees the payment of a debt.<sup>2</sup>

## SECTION 2.—*By neglect or refusal to sue after request.*

As has been shown, the mere omission of a creditor to sue will not discharge a surety, unless the creditor is under some legal obligation to sue.

If the surety requests the creditor to sue, this will, in some States, create such an obligation; and it has been established, accordingly, that if a surety requests the creditor to sue, and he neglects or refuses to do so, the surety will be discharged if the neglect has produced injury,<sup>3</sup> irrespective of any knowledge of the creditor, or notice to him of any fact suggesting the probability that delay could prove injurious to the surety.<sup>4</sup> It is the settled law of New York, and one of the rules of the relation of creditor, principal debtor, and surety, that the surety, while the principal is solvent and can be made to pay the debt, may require of the creditor that he collect it of the principal, and if the creditor refuses or neglects to do so,

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<sup>1</sup> See *ante*, p. 139; *Brackett v. Rich*, 23 Minn. 485; *S. C.* 23 Am. R. 703; *Stone v. Rockefeller*, 29 Ohio St. 625; *Bull v. Bliss*, 30 Vt. 127; *Sanford v. Allen*, 1 Cush. 473; *McClurg v. Fryer*, 15 Penn. St. 293.

<sup>2</sup> *Ircine v. Brasfield*, 10 Heisk. (Tenn.) 425; *Jones v. Greenlaw*, 6 Coldw. (Tenn.) 342; *Foster v. Tolleson*, 13 Rich. (S. C.) L. 31.

<sup>3</sup> *Remsen v. Beekman*, 25 N. Y. 552; *Clark v. Sickler* 64 N. Y. 231; *Martin v. Skehan*, 2 Col. T. 614; *Colgrove v. Tallman*, 67 N. Y. 95; *Goodman v. Griffin*, 3 Stew. 160; *Johnston v. Thompson*, 4 Watts, 446.

<sup>4</sup> *Remsen v. Beekman*, 25 N. Y. 552.

and the principal becomes insolvent and unable to pay, the creditor may not then have his debt of the surety.<sup>1</sup>

The surety is discharged, in such case, because it is the duty of the creditor to obtain payment, in the first instance, of the principal debtor, and not of him who is surety; it is right that the principal should pay the debt; it is inequitable and unjust for the creditor, by delaying to sue, to expose the surety to the hazard arising from a prolongation of the credit; and the creditor is under an equitable obligation to obtain payment from the principal, and not from the surety, unless the principal is unable to pay.<sup>2</sup>

This doctrine of the New York courts is not extended to the kindred contracts of guaranty and indorsement.<sup>3</sup>

In some of the States it is held that a surety is not discharged by the failure of the creditor to sue after request by the surety, although at the time of the request the principal was solvent, and subsequently became in-

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<sup>1</sup> *Colgrove v. Tallman*, 67 N. Y. 95; *Remsen v. Beekman*, 25 N. Y. 552; *Pain v. Packard*, 13 Johns. 174; *King v. Baldwin*, 17 Johns. 384; *Manchester Iron Co. v. Sweeting*, 10 Wend. 162. See, also, *Goodman v. Griffin*, 3 Stew. 160; *Johnson v. Thompson*, 4 Watts, 446; *Bruce v. Edwards*, 1 Stew. 11; *Geddis v. Hawk*, 10 S. & R. 33; *Lichtenhaler v. Thompson*, 13 S. & R. 157; *Gardiner v. Ferree*, 15 S. & R. 28.

The doctrine that a surety may give the creditor notice to proceed against the principal, and, if the latter refuses, to the damage of the surety, the obligation of the surety is discharged or diminished, is not a favorite of the law, and is not accepted in all forums. 3 Kent's Com. 124, note c. It was against opposition that it was adopted into the law of New York (see *King v. Baldwin*, 17 Johns. 384, 390, 394, 396, 397, 402; *Colgrove v. Tallman*, 67 N. Y. 95, 99), and it is not to be applied with laxity. *Hunt v. Purdy*, N. Y. Ct. App. November Term, 1880, not reported.

<sup>2</sup> *Colgrove v. Tallman*, 67 N. Y. 95, 99.

<sup>3</sup> *Wells v. Mann*, 45 N. Y. 327. See *Pitts v. Congdon*, 2 N. Y. 352; *Trimble v. Thorn*, 16 Johns. 151. As to guaranties of collection, see preceding section.

solvent;<sup>1</sup> and that a surety is not permitted at law to discharge himself from liability by requesting the creditor to proceed against the principal debtor.<sup>2</sup> Where the contrary rule is law, a request by a surety that the creditor shall sue the principal debtor, and his failure to sue, is unavailing as a defense unless it is shown that the principal at the time of the request was solvent and subsequently became insolvent.<sup>3</sup> In proof of the solvency of the principal at the time of the request, it must satisfactorily appear that the debt was then collectible by due course of law out of the property of the principal, and not merely that if the principal had been pressed he might have paid the debt had he wished to do so.<sup>4</sup> What is meant by the terms "solvent" and "insolvent," has been frequently decided by the courts.<sup>5</sup> Enough must be shown to render it apparent that the act of the creditor has been legally injurious to the surety or inconsistent with his legal rights. Mere indulgence is not sufficient.<sup>6</sup> Ordinarily, to discharge a surety by reason of a neglect to proceed against a solvent principal, on request, it must be shown that the creditor was requested to enforce the collection of the debt by due course of law. Nothing short of that will exonerate the surety.<sup>7</sup> The terms in which the request is made are not material, but they should be unequivocal, and clearly and plainly intended and understood as a request to collect by pros-

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<sup>1</sup> *Pintard v. Davis*, 1 N. J. 632; *Carr v. Howard*, 8 Blackf. 190; *Dennis v. Rider*, 2 M'Lean, 451.

<sup>2</sup> *Taylor v. Beck*, 13 Ill. 376; *Harris v. Newell*, 42 Wis. 687.

<sup>3</sup> *Huffinan v. Hurlburt*, 13 Wend. 377; *Herrick v. Borst*, 4 Hill, 650.

<sup>4</sup> *Davis v. Huggins*, 3 N. H. 231.

<sup>5</sup> See *Herrick v. Borst*, 4 Hill, 650; *Bayly v. Schofield*, 1 Maul. & S. 338; *Shone v. Lucas*, 3 Dowl. & Ryl, 218.

<sup>6</sup> *Clark v. Sickler*, 64 N. Y. 231; *Goodwin v. Simonson*, 74 N. Y. 133.

<sup>7</sup> See *Goodwin v. Simonson*, 74 N. Y. 133; *Singer v. Troutman*, 49 Barb. 182; *Hunt v. Purdy* (N. Y. Ct. App.), not reported. See *Fulton v. Mathews*, 15 Johns. 433.

ecution.<sup>1</sup> Not only must the request be explicit and unconditional, but, in case the creditor is a corporation, it must be made to the proper officers who have power to act in the premises.<sup>2</sup> Merely telling the creditor to go to the principal debtor and get his money, is not equivalent to a request to sue the principal.<sup>3</sup> The notice to proceed against the principal should be given after the maturity of the debt, and reasonable time to proceed should be allowed.<sup>4</sup>

SECTION 3.—*By neglect to sue after the statutory notice has been given.*

In many of the western and southern States the right of a surety to compel a creditor to commence an action to enforce the obligation for which the surety is bound, is given or regulated by statute.

In Iowa, it is provided by statute that "when any person bound as surety for another for the payment of money, or the performance of any other contract in writing, apprehends that his principal is about to become insolvent or to remove permanently from the State without discharging the contract, if a right of action has accrued on the contract, he may, by writing, request the creditor to sue upon the same, or permit the surety to commence suit in such creditor's name and at the surety's cost. If the creditor refuses to bring suit, or neglects to do so for ten days after request, and does not permit the surety to do so, and furnish him with a true copy of the contract or other writing therefor, and enable him to have the use of the original when requested in such suit, the surety shall be discharged."

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<sup>1</sup> *Singer v. Troutman*, 49 Barb. 182.

<sup>2</sup> *Mutual Life Ins. Co. v. Davies*, 12 Jones & Sp. 172.

<sup>3</sup> *Maier v. Canovan*, 57 How. (N. Y.) 504.

<sup>4</sup> *Donough v. Boyer*, 10 Phila. (Penn.) 616.

So, in Indiana, a surety on a promissory note that is due, apprehending the insolvency of the principal or his removal from the State, may, by written notice, require the holder of the note to sue on it, whether the principal is insolvent or not; and if the holder fail to sue on the note within a reasonable time after such notice, the surety is discharged.<sup>1</sup> So, in Kentucky, a surety may exonerate himself from his liability by giving sixty days' notice in writing to the creditor, that he must sue the principal within sixty days.<sup>2</sup> Without attempting to give or refer to the provisions of the many statutes having the same general object, a few illustrations will be given of the manner in which such statutes have been construed by the courts, and the effect given to the attempts of sureties to limit their liability under them.

Under the Iowa statute, the notice to sue may be given to the creditor personally, or to his authorized agent having the obligation in his hands for collection;<sup>3</sup> but under the Arkansas statute, allowing the surety to require "the person having the right of action" on the note or other obligation to commence suit, it has been held that notice to the attorney of the holder is not sufficient, he not being the person having the right of action, and it not appearing that he was the authorized agent of the holder.<sup>4</sup> And that notice to the clerk of the trustees of a bank is not a sufficient notice under the

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<sup>1</sup> *Reid v. Cox*, 5 Blackf. 312.

<sup>2</sup> *Nichols v. McDowell*, 14 B. Mon. 6.

<sup>3</sup> *Thornburgh v. Madren*, 33 Iowa, 380.

<sup>4</sup> *Cummins v. Garretson*, 15 Ark. 132. The statute referred to provides, that "any person bound as security for another in any bond, bill, or note for the payment of money, or the delivery of property, may, at any time, after such action has accrued thereon, by notice in writing, require the person having such right of action forthwith to commence suit against the principal debtor and the other party liable. If such suit is not commenced within thirty days after service of notice, &c., such surety shall be exonerated from liability to the person notified."

statute, even though one of the trustees had actual notice.<sup>1</sup>

It was held, under the Mississippi statute, that a notice by the surety to the creditor, requiring him to bring suit against the principal, is sufficient if given orally, if the creditor receives and acknowledges it, and agrees to commence an action accordingly;<sup>2</sup> but under the Code it has been held that the notice must be in writing.<sup>3</sup> So, in Alabama, it has been held, that verbal notice by a surety to the obligee in a bond after its maturity, requiring him to sue the principal, is sufficient to discharge the surety if the creditor neglect to bring suit.<sup>4</sup> The same principle has also been held in Missouri.<sup>5</sup> But in Ohio, it is held that the notice is of no avail unless it be in writing.<sup>6</sup>

A telegram, sent by the surety to the holder of a note, requesting him to "express Nolan & Co.'s note to B. for collection to-day," without fail, has been held not to be a sufficient "notice in writing" to discharge the surety under the Indiana statute.<sup>7</sup>

A notice under the Iowa statute, requiring the creditor to bring suit, must require that the suit be brought against all the parties, and not simply against the principal.<sup>8</sup>

A notice by the surety, that he "wishes" the creditor to proceed for his debt, or have it arranged in some way, and that he "does not wish" to remain bail any longer,<sup>9</sup> or that the surety "will not stand good as security any

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<sup>1</sup> *Adams v. Roane*, 2 Eng. 360.

<sup>2</sup> *Taylor v. Davis*, 38 Miss. 493.

<sup>3</sup> *Bridges v. Winters*, 42 Miss. 135.

<sup>4</sup> *Strader v. Houghton*, 9 Port. 334.

<sup>5</sup> *Bolton v. Lunday*, 6 Mo. 46.

<sup>6</sup> *Jenkins v. Clark*, 7 Ham. 72.

<sup>7</sup> *Kaufman v. Wilson*, 29 Ind. 504.

<sup>8</sup> *Harriman v. Egbert*, 36 Iowa, 270; *Hill v. Sherman*, 15 Iowa, 365.

<sup>9</sup> *Baker v. Kellogg*, 29 Ohio St. 663.



longer," on a specified note, is not a sufficient notice under the statute.<sup>1</sup>

The notice need not follow the precise words of the statute, and require that the suit be brought "against the principal debtor and the other parties liable ; but it will be sufficient if it mentions such parties by name.<sup>2</sup> And if the notice is so worded that its object cannot be misunderstood by the creditor, it will be sufficient, though it does not contain a description of the note.<sup>3</sup>

A letter from a surety to a bank cashier, expressing a hope that a note held by the bank "would be put in train for collection," as the surety had reason to believe that the principal would avoid payment if possible, is not a sufficient notice to sue under the Arkansas statute.<sup>4</sup> So a notice by a surety to a creditor "to push the principal or give him clear," is not such a notice as will operate to discharge the surety if not complied with.<sup>5</sup> A notice containing a mere hint to sue is not sufficient. "The direction must be clear and explicit, not liable to be misapprehended by the creditor, nor to be left to the court to grope after the meaning of the surety amongst ambiguous words."<sup>6</sup> Where the proper notice has been given, nothing more is required of the surety. The creditor must then act in response to the notice, or the surety will be discharged.<sup>7</sup>

Under the statutes of Arkansas, and of some of the other States, a notice given by one of two or more sureties will not affect the liability of the co-sureties who have

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<sup>1</sup> Lockridge v. Upton, 24 Mo. 184.

<sup>2</sup> Christy's Administrator v. Horne, 24 Mo. 242.

<sup>3</sup> Routon v. Lacy, 17 Mo. 399.

<sup>4</sup> Bates v. State Bank, 2 Eng. 394.

<sup>5</sup> Wilson v. Glover, 3 Barr. 404.

<sup>6</sup> Greenawalt v. Kreider, 3 Barr. 264.

<sup>7</sup> First, &c., Bank v. Smith, 25 Iowa, 210.

not given the statutory notice.<sup>1</sup> But in Alabama, if one surety gives notice to the holder of the note to proceed by law to collect the note, and is discharged by an omission of the creditor to sue, according to the notice, and the principal becomes insolvent, all the other sureties in the note are discharged by the same omission.<sup>2</sup>

Where the notice is sufficient in form, but the principal debtor was not a resident of the State at the time of its service, or at any time afterwards, a failure to commence a suit will not discharge the surety, although they promised to sue, and the principal had property in the State where he resided sufficient to satisfy the debt.<sup>3</sup>

Under the Missouri statute, a surety who has given notice to commence suit against all the parties liable, will not be discharged because the creditor does not join him in the suit, nor because a non-resident co-surety was not proceeded against.<sup>4</sup>

#### SECTION 4.—*By want of diligence in the prosecution of the suit.*

As has been stated, the mere delay of a creditor to enforce his legal remedies against the principal debtor, will not, in the absence of any direction to proceed, discharge a surety. Upon the same principle, if, after judgment and before levy, the creditor merely suspends execution, the surety will not be discharged.<sup>5</sup> But if the

<sup>1</sup> *Wilson v. Tebbetts*, 29 Ark. 579; S. C. 21 Am. R. 165; *Ramey v. Purvis*, 38 Miss. 499; *Routon v. Lacy*, 17 Mo. 399.

<sup>2</sup> *Towns v. Riddle*, 2 Ala. 694.

<sup>3</sup> *Conklin v. Conklin*, 54 Ind. 289.

<sup>4</sup> *Perry v. Barret*, 18 Mo. 140. As to what constitutes due diligence on the part of the notified creditor under the statute, see *Peters v. Linenschmidt*, 58 Mo. 464. See *Harrison v. Price*, 25 Gratt. 553.

<sup>5</sup> *Summerhill v. Tapp*, 52 Ala. 227; *Lumsden v. Leonard*, 55 Ga. 374; *Crawford v. Gaulden*, 33 Ga. 173; *Manice v. Duncan*, 12 La. Ann. 715; *Jerrauld v. Trippett*, 62 Ind. 122.

plaintiff in the judgment covenants with the principal debtor not to issue execution, or not to attempt the collection of the judgment, a surety who is also a defendant will be discharged.<sup>1</sup> While the law does not require a creditor, of his own motion, to commence an action against the debtor, yet if he does so, and acquires a specific lien on the property of the principal debtor by the levy of an attachment or of an execution, and afterwards in any manner relinquishes the same, or consents to a course of proceeding which will have the same effect, the surety will be discharged to the extent of the value of the property seized.<sup>2</sup> And if, after a judgment against the principal and surety, which has become a lien upon sufficient personal property of the principal to satisfy the debt, the creditor purchases this property, and applies it to the satisfaction of another debt due him from the principal, the lien of which is subordinate to the lien of the judgment against the principal and surety, and then removes the property from the State, so that the right of the surety to have the judgment satisfied out of the property so removed is defeated, the surety will be released from further liability, and may have the enforcement of the judgment as to him perpetually enjoined.<sup>3</sup>

An agreement to delay the issuing of an execution on a judgment which has been stayed, will not discharge a

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<sup>1</sup> *Evans v. Raper*, 74 N. C. 639; *Boughton v. Bank of Orleans*, 2 Barb. Ch. R. 458; *Storms v. Thorn*, 3 Barb. 314.

<sup>2</sup> *City of Maquoketa v. Willey*, 35 Iowa, 323; *Hollingsworth v. Turner*, 44 Ga. 11; *Jenkins v. McNeese*, 34 Texas, 189; *Sherraden v. Parker*, 24 Iowa 28; *State Bank v. Edwards*, 20 Ala. 512; *Curan v. Colbert*, 3 Kelly, 239; *Brown v. Riggins*, 3 Kelly, 405; *Mayhew v. Crickett*, 2 Swamst. 193; *Cooper v. Wilcox*, 2 Dev. & Bat. Eq. 90; *Commonwealth v. Miller*, 8 S. & R. 452; *Dixon v. Ewing*, 3 Ham. 280; *Hurd v. Spencer*, 40 Vt. 581; *McMullen v. Hinckle*, 39 Miss. 142; *Freanor v. Yingling*, 37 Md. 491; *Martin v. Taylor*, 8 Bush, 384.

<sup>3</sup> *McMullen v. Hinckle*, 39 Miss. 142.

surety, unless the agreement is binding, and such as the courts can enforce;<sup>1</sup> and where no levy has been made, a mere direction by the creditor to suspend proceedings on an execution against the principal debtor until further orders, will not discharge the surety, unless the delay was granted on a good consideration.<sup>2</sup> And generally a mere gratuitous indulgence, given by the creditor to the principal debtor, after the recovery of a judgment against him, will not discharge a surety.<sup>3</sup> Under the Kentucky statutes, a surety in a debt on which judgment has been recovered, is discharged from liability by delay to sue out an execution on the judgment within seven years.<sup>4</sup>

Where a judgment has been recovered against principal and sureties, which is a lien upon the real estate of the principal, and the creditor, in order to make a title to one who has purchased a part of such real estate for its full value, agrees to release such part of the real estate upon condition that the purchase-money be applied to the satisfaction of a mortgage which was a lien prior to the lien of the judgment, upon all the real estate, the surety will not be discharged.<sup>5</sup> So, if the creditor adjourn the sale of property seized on execution against the principal, this will not release the surety, although the principal takes advantage of the delay to get his property released as exempt.<sup>6</sup> Some positive act to the injury of the surety must be shown to discharge a surety by reason of the creditor's neglect in pursuing the principal debtor.<sup>7</sup>

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<sup>1</sup> *Sharp v. Fagan*, 3 Sneed (Tenn.), 541.

<sup>2</sup> *Hetherington v. Branch Bank at Mobile*, 14 Ala. 68; *Royston v. Howie*, 15 Ala. 309; *Humphrey v. Hitt*, 6 Gratt. 509; *Jerrauld v. Trippett*, 62 Ind. 122. But see *Glass v. Thomson*, 9 B. Mon. 235.

<sup>3</sup> *Sawyer v. Patterson*, 11 Ala. 523; *Creath v. Sims*, 5 How. (U. S.) 192.

<sup>4</sup> *Bray v. Howard*, 7 B. Mon. 467.

<sup>5</sup> *Neff's Appeal*, 9 Watts & Serg. 36.

<sup>6</sup> *Lilly v. Roberts*, 58 Ga. 363.

<sup>7</sup> *Jackson v. Patrick*, 10 S. C. 197.

SECTION 5.—*By failure to terminate the contract after default.*

Where a person has become a guarantor of the fidelity or honesty of another, who is about to engage in the service of a third person, the person giving the guaranty has a right to expect that the person to whom the guaranty is given will deal fairly with him, and discharge the employee on discovery of any act of absolute dishonesty, or, at least, that notice of the act will be given to him, so that he may protect himself from further loss. When the agent of a corporation, appointed for an indefinite time, is under a bond to account and pay over daily, and he fails to perform for one day, or any number of days, the question whether he can be afterwards trusted with additional funds, at the risk of the surety upon his bond, consistently with good faith and fair dealing, without first giving notice to the surety, depends upon the apparent cause of his failure. If the corporation, or its supervising officers, have reason to believe that the failure of the agent results from his dishonest practices or intentions, such as a conversion of the money, or a purpose to convert it, no further funds can be rightfully committed to his custody. If, on the other hand, the circumstances do not point to moral turpitude, but to lax habits of business, a want of diligence or punctuality rather than a want of honesty, the corporation may continue to trust him, treating his successive failures in promptness as breaches of contract only, and relying upon the bond for protection should ultimate loss occur.<sup>1</sup> In cases of continuing guarantees of the honesty of a servant, the courts hold that where the person receiving the guaranty continues

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<sup>1</sup> Charlotte, Columbia and Augusta R. R. Co. v. Gow, 59 Ga. 685; S. C. 27 Am. R. 403. See Atlantic & Pacific Tel. Co. v. Barnes, 64 N. Y. 385; Howe Machine Co. v. Farrington, 16 Hun, 591.

to retain the servant in employment after knowledge of dishonest acts of the employee, committed in the course of the employment, without notice to the guarantor, the latter will be discharged from all liability for any dishonest act of the servant committed after the discovery of the servant's misconduct.<sup>1</sup> The decision is put upon the ground, that if the dishonesty of the principal had occurred, to the knowledge of the employer, before the contract of guaranty was given, the concealment of it from the guarantor would have been a fraud upon him, which would have relieved him from liability on his subsequent contract; that as the contract entered into is a continuing guaranty, and the obligation of the guarantor is continuing, the duty of the creditor is also continuing; and that the creditor is as much bound to inform of dishonesty coming to his knowledge, after the making of the contract, as before.

But a creditor is not bound to notify the surety of every default of the principal debtor, at the peril of discharging the surety, when the contract of the latter does not relate to the honesty and fidelity of the principal. Where the contract of a surety is not for the payment of a definite sum on a given day, but is for a continuing transaction, contemplating a recurring indebtedness, to be made and extinguished monthly, renewable as often and as soon as paid, the failure of the creditor to call the principal to account, and to enforce payment at the times stated in the contract, will not discharge the surety.<sup>2</sup> The sureties on the bond of an officer of a private corporation, conditioned for the faithful discharge, by the officer, of

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<sup>1</sup> *Phillips v. Foxall*, L. R. 7 Q. B. 666. See *Sanderson v. Aston*, L. R. 8 Exch. 73.

<sup>2</sup> *McKechnie v. Ward*, 58 N. Y. 541; S. C. 17 Am. R. 281; *Trent Navigation Co. v. Harley*, 10 East, 34; *London Ass. Co. v. Buckle*, 4 J. B. Moore, 153.

his duties, will not be discharged by neglect of the officers of the corporation to make the examination of the officer's accounts, required by the rules of the corporation.<sup>1</sup> So, in an action by the Government against the sureties of a postmaster on his official bond, it is no defense that the Government, through their agent, the Auditor of the Treasury of the Post-office Department, had full knowledge of the defalcation and embezzlement of funds of the plaintiff, and yet neglectfully permitted him to remain in office, whereby he was enabled to commit other defaults and embezzlements.<sup>2</sup> So, the sureties on the bond of a county treasurer are not discharged by any neglect, omission of duty, unfaithfulness or malfeasance on the part of the Board of Supervisors of the county, in their dealings with the principal in the bond.<sup>3</sup>

#### SECTION 6.—*By release of co-surety or indorser.*

It is a rule of equity, that when a co-surety has, by the conduct of the creditor, been released from his liability, the remaining co-surety will be exonerated only as to so much of the original debt as the discharged co-surety

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<sup>1</sup> Mutual Loan and Building Association v. Price, 16 Florida, 204 ; s. c. 26 Am. R. 703. See United States v. Kirkpatrick, 9 Wheat. 721.

<sup>2</sup> Jones v. United States, 18 Wall. 662.

<sup>3</sup> Board of Supervisors v. Otis, 62 N. Y. 88. In this case the court held that the board and the county treasurer are alike the agents of the county, as a body corporate; and the acts and neglect of one agent cannot affect or detract from the liability of another agent, or of the sureties of either to the common principal. The law, while it imposes upon the supervisors the duty of examining the accounts of county treasurers, does not guarantee to the sureties the performance of that duty, or make the omission or negligent performance of it, available to the sureties as a release from their obligation, or a defense to an action upon the bond of their suretyship. The board owes no duty to the sureties, and the neglect of duty which is available as a defense for a surety, must be of some duty owing to him and not to others.

could have been compelled to pay had his obligation continued.<sup>1</sup>

Where parties are jointly bound for the same debt or duty, they occupy the relation of sureties for each other; and it is held in England, that an act of a creditor, though by parol, which discharges one of two or more joint debtors, discharges both or all, though the contract be in writing.<sup>2</sup> In this country the rule is different. Here, a release by parol to one joint debtor will not operate as a discharge to other debtors jointly liable, and can be pleaded only by the debtor to whom it is given.<sup>3</sup> In Maryland, the release of one or more sureties, without the assent of the co-sureties, will operate at law to discharge the latter; but, in equity, the release of one or more sureties will not discharge the remainder, unless it subjects them to an increased risk or liability.<sup>4</sup>

The guarantor of a promissory note will not be released from liability on his contract, by the neglect of the creditor to give notice of protest to an indorser thereon, though the effect of the neglect is to discharge a solvent indorser. As there rests no obligation on the holder of a note, when he seeks to change the guarantor only, to give such notice as will bind an indorser, the guarantor cannot be relieved if it is not done. Any detriment he may thereby suffer, the law presumes he assented to assume, by entering into a contract which provides no protection against it.<sup>5</sup>

The sureties in an undertaking given on an undertaking to the General Term, conditioned that the appel-

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<sup>1</sup> *Sterling v. Forrester*, 2 Bligh, 575; *Ex parte Gifford*, 6 Ves. 805; *Mayhew v. Crickett*, 2 Swanst. 185; *Hodgson v. Hodgson*, 2 Keen, 704.

<sup>2</sup> *Nicholson v. Revill*, 4 Ad. & Ell. 675.

<sup>3</sup> *Harrison v. Close*, 2 Johns. 448; *Rowley v. Stoddard*, 7 Johns. 209; *De Zeng v. Bailey*, 9 Wend. 336; *Morgan v. Smith*, 70 N. Y. 537.

<sup>4</sup> *Smith v. State*, 46 Md. 617.

<sup>5</sup> *Green v. Thompson*, 33 Iowa, 293; *Deck v. Works*, 18 Hun, 266.



lant will pay "all costs and damages which may be awarded against him on such appeal," are not liable for the costs of an appeal, by their principal, to the Court of Appeals, from a judgment of affirmance of the General Term; and if, upon the appeal to the Court of Appeals, a new undertaking is given for the judgment and costs, as between the two sets of sureties, the primary liability rests upon the latter, and their release by the judgment creditor discharges the former.<sup>1</sup>

Under the Alabama Code,<sup>2</sup> a release by a creditor, for a valuable consideration, of one of several co-sureties on a penal bond, when some of them are insolvent, is not a discharge of the others, except to the extent of his liability to them for contribution. But to that extent it is a discharge, although it contains an express stipulation that it is not in any manner to affect or operate as a discharge of the liabilities of the other obligors in the bond, or to affect or discharge any action or right of action against them.<sup>3</sup>

A direction, by the plaintiff, in an execution issued on a judgment recorded against the maker and all the sureties on a promissory note, requiring its return, unsatisfied, after a levy on sufficient property of a surety to satisfy the debt, releases the remaining sureties.<sup>4</sup>

#### SECTION 7.—*By release of securities.*

It is a well settled principle in equity, that a creditor who has the personal contract of his debtor, with a surety,

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<sup>1</sup> *Hinckley v. Kreitz*, 58 N. Y. 583. When a note with a surety is given as collateral security for another note, a release of a party liable on such other note will release the surety on the collateral note. *Stallings v. Americus Bank*, 59 Ga. 701.

<sup>2</sup> Ala. Revised Code, § 3072.

<sup>3</sup> *Jenison v. Governor of Alabama*, 47 Ala. 390.

<sup>4</sup> *Martin v. Taylor*, 8 Bush (Ky.), 384.

and takes property from the principal as a pledge or security for the debt, should hold the property for the benefit of the surety as well as himself; and if he parts with it without the knowledge or against the will of the surety, he shall lose his claim against the surety to the amount of the property so surrendered. The property so taken by the creditor, is taken and held in trust, not only for the creditor's security but for the surety's indemnity.<sup>1</sup> These principles are recognized and enforced in courts of law,<sup>2</sup> even where the surety was ignorant of the existence of the securities held by the creditor, or where they were taken subsequently to the date of the contract of suretyship.<sup>3</sup> If the principal debtor execute a chattel mortgage upon his property for the security of the creditor, and the latter, through neglect to have it recorded, permits and allows the debtor to convey the mortgaged property to *bona fide* purchasers, and thereby loses the security, the surety will be discharged.<sup>4</sup> And the surety will also be discharged, if the creditor permits the principal debtor to sell and retain the proceeds of property delivered to the creditor in discharge of the debt.<sup>5</sup> The release or surrender of the securities by the creditor, does not, however, discharge the surety ab-

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<sup>1</sup> Kirkpatrick v. Howk, 80 Ill. 122; Hurd v. Spencer, 40 Vt. 581; Succession of Pratt, 16 La. Ann. 357; Kennedy v. Bossier, 16 La. Ann. 445; Barrow v. Shields, 13 La. Ann. 57; Springer v. Toothaker, 43 Me. 381; New Hampshire Savings Bank v. Colcord, 15 N. H. 119; Hubbell v. Carpenter, 5 Barb. 520; Neff's Appeal, 9 Watts & S. 36; Payne v. Commercial Bank of Natchez, 6 Smedes & Marsh, 24; Ferguson v. Turner, 7 Mo. 497; Smith v. McLeod, 3 Ired. Ch. 390; Nelson v. Williams, 3 Dev. & Bat. Ch. 118; Griswold v. Jackson, 2 Edw. Ch. 461; Cullum v. Emanuel, 1 Ala. (N. S.) 23; Clopton v. Spratt, 52 Miss. 251; Dillon v. Russell, 5 Neb. 484; Moore v. Gray, 26 Ohio St. 525.

<sup>2</sup> Kirkpatrick v. Howk, 80 Ill. 122.

<sup>3</sup> Freoner v. Yngling, 37 Md. 491.

<sup>4</sup> Burr v. Boyer, 2 Neb. 265. But see Lang v. Brevard, 3 Strobb. Eq. 59; Philbrooks v. McEwen, 29 Ind. 347.

<sup>5</sup> Ruble v. Newman, 7 Bush (Ky.). 584.

solutely from all liability, but only to the extent of the securities released.<sup>1</sup>

The reason of rule, that a surety is discharged by the release of securities given by the principal debtor to secure the creditor, to the extent of the securities released, applies as well to money or other property in the hands of the creditor, and belonging to the principal debtor, and which the creditor might rightfully retain and appropriate to the satisfaction of his debt, without violating any duty, or subjecting himself to any action; and if, instead of retaining it, and appropriating it to the satisfaction of the debt, the creditor suffers it to pass into the hands of the principal, the surety will be to that extent discharged.<sup>2</sup> The surrender of a fictitious or forged bond, held by the creditor for the benefit of the surety, will not operate to discharge the surety.<sup>3</sup> Nor will the surrender of a valid security have that effect if made with the knowledge and assent of the surety.<sup>4</sup> But where the assent of the surety is wanting, the fact that other and better security than that surrendered was sub-

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<sup>1</sup> *Barrow v. Shields*, 13 La. Ann. 57; *Everly v. Rice*, 20 Penn. 297; *Saline County v. Buil*, 65 Mo. 63.

The doctrine that waste or misapplication of collateral securities held by the creditor will release the surety to the amount of the loss actually sustained, does not apply to security given by law. Thus, if the lessor of land takes notes with personal security for the payment of the rent, and also reserves in his lease the right to distrain, the lessor is not bound to assert the lien thus secured, but may collect the notes of the surety. *Hull v. Hoxsey*, 84 Ill. 616.

<sup>2</sup> *Perrine v. Firemen's Ins. Co. of Mobile*, 22 Ala. 575; *Commonwealth v. Miller*, 8 S. & R. 452.

But where the principal to a note payable to a bank has funds on deposit in the bank, after the maturity of the note, more than sufficient to pay it, the mere omission of the bank to appropriate the deposit to the payment of the note will not discharge the surety. *Voss v. German American Bank of Chicago*, 83 Ill. 599; S. C. 25 Am. R. 415; and see *National Bank of Newburgh v. Smith*, 66 N. Y. 271; S. C. 23 Am. R. 48.

<sup>3</sup> *Loomis v. Fay*, 24 Vt. 240.

<sup>4</sup> *New Hampshire Savings Bank v. Colcord*, 15 N. H. 119.

stituted for it, will not defeat the claim of the surety to be discharged.<sup>1</sup>

SECTION 8.—*By extension of time of payment.*

It has been stated, in a previous section, that mere indulgence, forbearance, or delay, on the part of a creditor towards the principal debtor, or the omission of the creditor to sue, will not discharge a surety, unless the creditor is under some obligation to sue, or unless forbearance would prejudice the claim of the surety upon the principal, and thereby work his injury.<sup>2</sup> What was there said, applies only to cases in which the creditor has remained passive, and neglected to enforce his claim against the principal debtor. But when the creditor does not remain passive, but, by some affirmative act, extends the time within which the principal debtor may perform his contract, an entirely different question is presented, and the indulgence secured to the principal debtor, by contract with the creditor, may wholly discharge the surety or guarantor from all liability on his contract. But, to have this effect, there must be some binding agreement between the creditor<sup>3</sup> and principal debtor, entered into without the knowledge or consent of the surety,<sup>4</sup> founded upon a valuable consideration,<sup>5</sup> for an extension of time

<sup>1</sup> New Hampshire Savings Bank v. Colcord, 15 N. H. 119. If the principal debtor places in his creditor's hands securities sufficient to satisfy a sealed note, and the creditor, contrary to the instructions of the principal, applies the proceeds to simple contract debts, the sureties on the note will be discharged. Rosborough v. McAliley, 10 S. C. 235.

<sup>2</sup> See *ante*, p. 219.

<sup>3</sup> See Lawrence v. Johnson, 64 Ill. 351.

<sup>4</sup> Brown v. Prophit, 53 Miss. 649; Rice v. Isham, 4 Abb. (N. Y.) App. Dec. 37; Remsen v. Graves, 41 N. Y. 471; Treat v. Smith, 54 Me. 112; Adams v. Way, 32 Conn. 160; Wright v. Storrs, 32 N. Y. 691; La Farge v. Harter, 11 Barb. 159; Stone v. State Bank, 3 Eng. 141; Berry v. Pullen, 69 Me. 101.

<sup>5</sup> Hogshead v. Williams, 55 Ind. 145; Oberndorf v. Union Bank of Baltimore, 31 Md. 126; S. C. 1 Am. R. 31; Abel v. Alexander, 45 Ind. 523; Crawford v. Gaulden, 33 Ga. 173; Rose v. Williams, 5 Kans. 483; Galbraith

for a definite period,<sup>1</sup> whereby the creditor's hands are tied, so that he cannot proceed to collect from the prin-

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*v. Fullerton*, 53 Ill. 126; *Grover v. Hoppock*, 2 Dutch (N. J.) 191; *Roberts v. Stewart*, 31 Miss. 664; *Freeland v. Compton*, 30 Miss. 424; *Shook v. State*, 6 Ind. 113; *Shook v. Commissioners of Ripley Co.*, 6 Ind. 461; *Draper v. Romeyn*, 18 Barb. 163; *Clark County v. Covington*, 26 Miss. 470; *Hoyt v. French*, 4 Foster (N. H.) 198; *Hetherington v. Branch Bank of Mobile*, 14 Ala. 68; *Gardner v. Watson*, 13 Ill. 347; *Oberndorfer v. Union Bank*, 31 Md. 126; *Buckalew v. Smith*, 44 Ala. 638; *Hunt v. Postlewait*, 28 Iowa. 427; *Davis v. Graham*, 29 Iowa, 541; *Leavitt v. Savage*, 4 Shep. 72; *Bailey v. Adams*, 10 N. H. 162; *Joslyn v. Smith*, 13 Vt. 353; *Payne v. Commercial Bank of Natches*, 6 Smed. & M. 24; *Newell v. Hamer*, 4 How. (Miss.) 684; *Nichols v. Douglas*, 8 Mo. 49; *Marks v. Bank of Missouri*, 8 Mo. 316; *Coman v. State*, 4 Blackf. 241; *Farmers' Bank v. Reynolds*, 13 Ohio 84; *Reynolds v. Ward*, 5 Wend. 501; *Hogaboom v. Herrick*, 4 Vt. 131. But see *Adle v. Metoyer*, 1 La. Ann. 254. Mere forbearance, or a revoked promise to forbear, will not discharge a surety. *Mutual Life Ins. Co. v. Davies*, 12 Jones & Sp. 172.

<sup>1</sup> *Deal v. Cochran*, 66 N. C. 269; *Freeland v. Compton*, 30 Miss. 424; *Clark County v. Covington*, 26 Miss. 470; *Thornton v. Dabney*, 23 Miss. 559; *Gardner v. Watson*, 13 Ill. 347; *McGee v. Metcalf*, 12 S. & M. 535; *Miller v. Stern*, 2 Barr, 286; *Parnell v. Price*, 3 Rich. 121; *Wadlington v. Gary*, 7 S. & M. 522; *Waters v. Simpson*, 2 Gill. 570; *People v. McHatten*, 2 Gill. 638; *Barry v. Pullen*, 69 Me. 101; S. C. 31 Am. R. 248; *Wynne v. Colorado Springs Co.*, 3 Col. 155.

From the payment of interest in advance, and its receipt by the holder of a note, an agreement to extend the time of payment of the note during the period for which interest is paid, may be implied. But where there is an agreement for an extension generally, for no definite time, and interest has been paid in pursuance thereof, but not in advance, no agreement to extend the time of payment for any particular length of time can be implied, and the surety is not discharged. *Jarvis v. Hyatt*, 43 Ind. 163. It is frequently said in the reports that the extension of time which will operate to discharge a surety must be for a definite period. It is not meant by this that the extension must be for a specified number of days or months, or to a specified day, but merely that the time must not be indefinitely extended, so that the limit of the period of indulgence cannot be ascertained.

An agreement entered into between the holder and maker of a note to extend the time of payment "until the summer," or "until the fall" falls within the rule. The courts take judicial notice of seasons, and of the general course of agriculture, and will construe the phrase, "until the summer" as meaning to the commencement of summer, or the first of June; and "until the fall" as meaning until the commencement of the fall season, or the first of September. *Abel v. Alexander*, 45 Ind. 523; S. C. 15 Am. R. 270.

principal debtor until the expiration of the additional time granted to him.<sup>1</sup> But if such an agreement is entered into, the surety will be discharged,<sup>2</sup> whether the agreement was made before or after judgment against the

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<sup>1</sup> *McKecknie v. Ward*, 58 N. Y. 541; *Rucker v. Robinson*, 38 Mo. 154; *McCune v. Belt.*, 38 Mo. 281; *Burke v. Cruger*, 8 Texas 66; *Berry v. Pullen*, 69 Me. 101; S. C. 31 Am. R. 248; *Howell v. Sevier*, 1 Lea (Tenn.) 360; S. C. 27 Am. R. 771; *Wright v. Watt*, 52 Miss. 634; *Hosea v. Rowley*, 57 Mo. 357; *Byers v. Hussey*, 4 Col. 515.

But see *Austin v. Dorwin*, 21 Vt. 38.—Unless the contract for delay is valid, it will not discharge the surety. *White v. Summers*, 57 Tenn. 154. By a valid agreement to give time, is meant an agreement for the breach of which the maker has a remedy, either at law or in equity. *Veazie v. Carr*, 3 Allen, 14. An oral agreement for the extension of the time of the principal debtor to pay a note will not discharge a surety on the note. *Berry v. Pullen*, 69 Me. 101; S. C. 31 Am. R. 248. The test is, can the agreement for delay be enforced against the creditor, either as a defense to a suit upon the note, or as a cause of action. If so, the surety will be discharged, otherwise not. *Howell v. Sevier*, 1 Lea (Tenn.) 360. See *Draper v. Romeyn*, 18 Barb. 166; *Wheeler v. Washburn*, 24 Vt. 293; *Turrill v. Boynton*, 23 Vt. 142; *Greeley v. Dow*, 2 Met. 176. In some cases, the test applied is whether the creditor would make himself liable to the principal by proceeding against him immediately after giving the promise of forbearance, for if he would not, the legal relation of the parties is unchanged, and there is no equitable ground for the exoneration of the surety, and therefore there can be no discharge. *Leavitt v. Savage*, 16 Me., 72; *Lead. Cas. Eq.*, 1867, *et. seq.*

An agent employed merely to collect a note cannot extend the time of payment, and thus discharge the sureties thereon. *Lawrence v. Johnson*, 64 Ill. 351.

<sup>2</sup> *Wright v. Watt*, 52 Miss. 634; *Smith v. Townsend*, 25 N. Y. 479; *Bank of Albion v. Burns*, 46 N. Y. 170; *Dunham v. Countryman*, 56 Barb. 268; *Myers v. First National Bank*, 78 Ill. 257; *Stewart v. Parker*, 55 Ga. 656; *White v. Whitney*, 51 Ind. 124; *Jarvis v. Hyatt*, 43 Ind. 163; *Apperson v. Cross*, 5 Heisk. (Tenn.) 481; *Pierce v. Goldsberry*, 31 Ind. 52; *Ark. v. Mobile &c. R. R. Co.*, 44 Ala. 611; *Bonney v. Bonney*, 29 Iowa, 448; *Rose v. Williams*, 5 Kans. 483; *Calvin v. Wiggan*, 27 Ind. 489; *Blazer v. Bundy*, 15 Ohio St. 57; *Musgrave v. Glasgow*, 3 Ind. 31; *Harbert v. Dumont*, 3 Ind. 346; *Uhler v. Applegate*, 26 Penn. St. 140; *Lime Rock Bank v. Mallet*, 34 Me. 547; *Fuller v. Milford*, 2 M'Lean 74; *Hutchinson v. Moody*, 6 Shep. 303; *Leavitt v. Savage*, 4 Shep. 72; *Greely v. Dow*, 22 Met. 176; *Inge v. Branch Bank*, 8 Port, 108; *Bank of Stubenville v. Hoge*, 6 Ham. 17; *Clipping v. Creps*, 2 Watts, 45; *Kennebeck Bank v. Tuckerman*, 5 Greenl. 130; *American Button Hole, &c. Co. v. Gurney*, 44 Wis. 49; *Buck v. Smiley*, 64 Ind. 431.

principal or surety, or both,<sup>1</sup> and whether the extension was granted for a single day, or for a longer time,<sup>2</sup> and whether the creditor is a State or an individual,<sup>3</sup> and whether the extension operated to the injury of the surety or otherwise,<sup>4</sup> or even if it was beneficial to him.<sup>5</sup>

The courts will not speculate as to whether or not the extension of time in fact operated to the prejudice of the surety, but will presume injury from the extension, and discharge him absolutely.<sup>6</sup>

To the general rule, that a valid agreement, extending the time of payment, made without the knowledge or consent of the surety, discharges the surety, there are some exceptions.

If the creditor was, in fact, ignorant of the relation existing between the principal and surety, or was not legally chargeable with knowledge of that relation,<sup>7</sup> or if

<sup>1</sup> *Bangs v. Strong*, 4 N. Y. 315; *Allison v. Thomas*, 29 La. Ann. 732; *Brown v. Riggins*, 3 Kelly, 405; *Storms v. Thom*, 3 Barb. 314; *State v. Hammond*, 6 Gill & Johns. 157; *Manufacturers' and Mechanics' Bank*, 7 Watts and Serg. 335; *Trotter v. Strong*, 63 Ill. 272. But see *Williams v. Wright*, 9 Humph. 593; *Hubbell v. Carpenter*, 2 Barb. 482.

<sup>2</sup> *Bangs v. Strong*, 7 Hill, 250; *Place v. McIlvain*, 38 N. Y. 96, 99; *Berry v. Pullen*, 69 Me. 248.

<sup>3</sup> *Prarie v. Jenkins*, 75 N. C. 515. See *State v. Roberts*, 68 Mo. 234.

<sup>4</sup> *Bank of Albion v. Burns*, 46 N. Y. 170; *Gahn v. Niemcewicz*, 11 Wend. 312; *Obendorf v. Union Bank of Baltimore*, 31 Md. 126; S. C. 1 Am. R. 31; *Pipkin v. Bond*, 5 Ired. 91; *Bower v. Tiemann*, 3 Denio, 512; *Calvo v. Davies*, 73 N. Y. 211, 216; *Dunham v. Countryman*, 66 Barb. 268; *Phoenix Warehousing Co. v. Badger*, 6 Hun, 293. The rule that a surety in a note will be discharged by an extension of time given to the principal is not affected by the fact that the surety signed the note subsequent to its execution, and without the knowledge or consent of the maker. *Howard v. Clark*, 36 Iowa, 114.

<sup>5</sup> See *Miller v. Stewart*, 9 Wheat, 680; *United States v. Tillotson*, Paine, 305; *Commissioners of Berks v. Ross*, 3 Binn. 520; *United States v. Hillegas*, 3 Wash. C. C. R. 70; *Rees v. Berrington*, 2 Ves. Jr. 540. *Samuel v. Howarth*, 3 Mer. 272.

<sup>6</sup> *Calvo v. Davies*, 73 N. Y. 211, 216; *Rees v. Berrington*, 2 Ves. Jr. 540; *Rathbone v. Warren*, 10 Johns. 587; *Miller v. McCan*, 7 Paige, 452.

<sup>7</sup> *Agnew v. Merritt*, 10 Minn. 308; *Kaighn v. Fuller*, 1 McCarter (N. J.)

the principal debtor has amply indemnified his surety by mortgage or otherwise,<sup>1</sup> or if in the contract extending the time of payment the remedy against the surety is expressly reserved,<sup>2</sup> an extension of time of payment of the original obligation will not discharge the surety. These exceptions will be noticed hereafter.

Where the real estate of a wife is mortgaged to secure the debt of her husband, she occupies the position of a surety, and she, and those claiming under her, are entitled to the benefit of the rules prohibiting the dealing of the creditor with the principal debtor to the prejudice of the surety; and an extension of the time of payment without her assent is such a dealing, and discharges the mortgage.<sup>3</sup> The fact that the mortgagee had no actual knowledge of the fact that the wife owned the mortgaged premises, and of the resulting relationship of principal and surety between the husband and wife, is immaterial, where the title is on record, as he thereby became chargeable with both knowledge of the title and the legal consequences resulting therefrom.<sup>4</sup>

If the creditor, at the time of entering into an agreement to extend the time of payment, reserves the right

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419; *Elwood v. Diefendorf*, 5 Barb. 398; *Nichols v. Parsons*, 6 N. H. 30; *Debeery v. Adams*, 9 Yerg. 52; *Howell v. Lawrenceville, &c. Co.* 31 Ga. 663; *Neel v. Harding*, 2 Met. (Ky.) 247.

<sup>1</sup> *Kleinhaus v. Geneveus*, 25 Ohio St. 667; *Chilton v. Robbins*, 4 Ala. 223. See *Myers v. Wells*, 5 Hill, 436; *Rittenhaus v. Kemp*, 37 Ind. 258.

<sup>2</sup> *Boaler v. Mayor*, 19 C. B. (N. S.) 76; *Wagman v. Hoag*, 14 Barb. 232; *Viele v. Hoag*, 24 Vt. 46; *Wyke v. Rogers*, 12 Eng. Law & Eq. 162; *Claggatt v. Salmon*, 5 Gill and J., 314; *Bangs v. Strong*, 10 Paige, 11; *Kearsley v. Cole*, 16 M. & W. 128; *Oriental Financial Corporation v. Overend*, 7 H. L. Cas. 343; *Calvo v. Davies*, 73 N. Y. 211; *Willis v. De Castro*, 4 C. B. (N. S.) 215; *Hubball v. Carpenter*, 5 N. Y. 171; *Lohier v. Loring*, 6 Cush. 537; *Yates v. Donaldson*, 5 Md. 389; *Hunt v. Knox*, 34 Miss. 655.

<sup>3</sup> *Smith v. Townshend*, 25 N. Y. 479; *Bank of Albion v. Burns*, 46 N. Y. 170. See *Calvo v. Davies*, 73 N. Y., 211; *Marshall v. Davies*, 21 Alb. Law. J. 12; 78 N. Y. 414.

<sup>4</sup> *Bank of Albion v. Burns*, 46 N. Y. 170.



to sue on the debt at the request of the surety, the sureties will not be discharged;<sup>1</sup> and if the agreement was on condition, it will not operate to discharge the surety until the condition has been fully observed and performed.<sup>2</sup> Time given to the principal debtor, by parol, to pay a specialty debt, does not at law discharge a surety.<sup>3</sup> But as a general rule, the same facts which will exonerate a surety from his liability in equity will also discharge him at law.<sup>4</sup>

An agreement between the creditor and the principal debtor, to extend the time of payment of a judgment, if made without the consent of the surety, will discharge him from liability,<sup>5</sup> even though the time be not extended beyond a period to which the debtor might have legally delayed the collection of the demand.

If the controversies between the creditor and principal debtor are submitted to arbitration, and the award extends the time of payment beyond that fixed in the

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<sup>1</sup> *Prout v. Branch Bank*, 9 Ala 309.

<sup>2</sup> *Hornsberger v. Gieger* 3 Gratt. 144.

<sup>3</sup> *Carr v. Howard*, 8 Blackf. 190; *Witmer v. Ellison*, 72 Ill. 301.

It is held in Maine, that an oral agreement for the extension of the time to pay a note will not discharge a surety. *Berry v. Pullen*, 69 Me. 101; S. C. 31 Am. R. 248. This decision seems to be put upon the ground that, to be binding, the contract under the statute of frauds, must be in writing, and that nothing but a binding contract for an extension of time can discharge a surety. In Tennessee, it is held that a parol agreement entered into between one of the makers of a note and the holder, before maturity of the note, to let the note run for a specified time after maturity, on consideration of the payment of ten per cent. interest after maturity, was not valid or binding, and not being enforceable by the principal would not discharge the surety. *McLin v. Brakebill*, September term, 1879. See *Howell v. Sevier*, 1 Lea, 360; S. C. 27 Am. R. 771; *Exchange and Deposit Bank v. Swepson*, Id. 355; *Wilson v. Langford*, 5 Humph. 320. By the statute of Tennessee it is made lawful to contract for any rate of interest, not exceeding ten per cent., provided the rate of interest be expressed in the written instrument creating the debt or obligation, otherwise the legal rate of interest to remain at six per cent.

<sup>4</sup> *Schroeppel v. Shaw*, 3 N. Y. 446.

<sup>5</sup> *Blazer v. Bundy*, 15 Ohio St. 57.

contract, the sureties for the performance of the contract will be discharged ;<sup>1</sup> and if the award of the arbitrators is not made within the time limited by the arbitration bond, a surety on the bond, who has not consented to the enlargement of the time, will be discharged.<sup>2</sup> If, after a judgment and levy on the property of the principal debtor, the creditor abandons the levy and releases the property seized, the surety will be discharged,<sup>3</sup> unless he has in his hands property of his principal liable for the principal's debts.<sup>4</sup> But merely countermanding an execution in the hands of the officer before it is levied,<sup>5</sup> or the failure of the officer, through negligence, to make the money out of the property of the principal,<sup>6</sup> will not discharge the surety.

An ordinary stipulation during a litigation, extending the time in which to answer, will not affect a surety, nor will any agreement for indulgence, unless it is founded upon a good consideration, and operates to prevent the collection of the demand in any form. But when the principal's obligation is payable in installments, and after default in the payment of one or more of the installments judgment by default is taken for the amount then past due, the installments are merged in the judgment, and a stipulation entered into upon a good consideration, after an order has been made opening the default, whereby the creditor agrees to stay proceedings for a definite time, is like a valid agreement not to sue, and operates

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<sup>1</sup> *Coleman v. Warde*, 6 N. Y. 44.

<sup>2</sup> *Brookins v. Shumway*, 18 Wis. 98.

<sup>3</sup> *Sherraden v. Parker*, 24 Iowa, 28; *Moss v. Pettingill*, 3 Minn. 217; *Morley v. Dickenson*, 12 Cal. 561; *Bank of Missouri v. Matson*, 24 Mo. 333; *State Bank v. Edwards*, 20 Ala. 512. See *Claffin v. Ostrom*, 54 N. Y. 584.

<sup>4</sup> *Glass v. Thompson*, 9 B. Mon. 235.

<sup>5</sup> *Humphrey v. Hitt*, 6 Gratt. 509.

<sup>6</sup> *Moss v. Croft*, 10 Wis. 720.

as a release of the surety in the principal obligation as to the installments merged in the judgment.<sup>1</sup>

As a general rule, any extension of time of payment which will discharge a surety will discharge a guarantor.<sup>2</sup> But it has been held, that an extension of time of payment of a bond, granted by the holder to the principal obligor after the maturity of the bond will not discharge the guarantor;<sup>3</sup> and that where an absolute guaranty has been indorsed on a note, and another note has been taken as collateral security for the note guaranteed, the guarantor will not be discharged though the holder transfers the note taken as collateral, the original all the time remaining in his hands.<sup>4</sup> So, if the principal debtor, after his debt becomes due, gives the creditor a note for the amount of the debt, antedated, so that by its terms it matures before the original debt, this will not be an extension of time, and will not discharge the guarantor. But, if as to part of the debt, the time is extended by note, without the consent of the guarantor, this will operate as a discharge *pro tanto*.<sup>5</sup> The mere taking of collateral security, by the holder of a note on which there is a guaranty, will not, in the absence of an extension of time of payment, discharge the guarantor;<sup>6</sup> and a previous, or contemporaneous oral agreement between the creditor and the principal debtor, that the latter shall have a longer time for making his payments than is stipulated in their written contract, being invalid as against the contract, will not discharge the guarantor.<sup>7</sup>

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<sup>1</sup> Ducker v. Rapp, 67 N. Y. 464.

<sup>2</sup> See Cross v. Wood, 30 Ind. 378; Ducker v. Rapp, 67 N. Y. 464.

<sup>3</sup> Hays v. Wells, 34 Md. 512.

<sup>4</sup> Penny v. Crane Brothers Manuf. Co. 80 Ill. 244.

<sup>5</sup> Robinson v. Dale, 38 Wis. 330.

<sup>6</sup> Sigourney v. Wetherell, 6. Met. 553.

<sup>7</sup> Robinson v. Dale, 38 Wis. 330.

SECTION 9.—*By implied contract for extension of time.*

The agreement extending the time of payment or credit need not be in any particular form of words, nor in express language. It may be inferred or implied from acts, declarations, facts and circumstances; and, when from these sources the mutual agreement of the parties is to be gathered, it is for the jury to determine what was the intention and understanding upon which the minds of the parties met.<sup>1</sup>

Thus, the receipt by the payee from the maker of a note, after maturity, of interest in advance, implies a contract for an extension of time of payment during the time for which the interest is so paid.<sup>2</sup> But, the payment of interest on a note up to the day it is paid, at a greater rate of interest than the party is legally bound to pay, does not, in the absence of other proof, show an agreement to extend the time of payment so as to release the surety.<sup>3</sup>

The acceptance of collateral security, to mature after the principal obligation, does not create an implied contract to extend the time of payment,<sup>4</sup> nor does the acceptance of interest, paid pursuant to an agreement for extension generally, for no definite time, create an implied contract for an extension of time for any particular period, unless the payment of interest is in advance,<sup>5</sup> nor does the indorsement, on a note overdue, of a payment more than sufficient to pay the interest then ac-

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<sup>1</sup> Brooks v. Wright, 13 Allen (Mass.), 72.

<sup>2</sup> Woodburn v. Carter, 50 Ind. 376; Jarvis v. Hyatt, 43 Ind. 163; New Hampshire Savings Bank v. Colcord, 15 N. H. 119; People's Bank v. Pearsons, 30 Vt. 711; Scott v. Saffold, 37 Ga. 384.

<sup>3</sup> Stearns v. Sweet, 78 Ill. 446.

<sup>4</sup> See Hays v. Wells, 34 Md. 512; Remsen v. Graves, 41 N. Y. 471; Cary v. White, 52 N. Y. 138.

<sup>5</sup> Jarvis v. Hyatt, 43 Ind. 163.

crued, necessarily imply an agreement between maker and payee for an extension of time of payment.<sup>1</sup>

SECTION 10.—*Consideration of agreements extending time.*

It has been stated, that an agreement extending time for payment of the principal's debt, in order to have the effect of discharging a surety, must be founded upon a sufficient consideration. The cases are not harmonious as to what will be deemed a sufficient consideration to support such an agreement, and an attempt to reconcile them would be idle.

The payment of interest on a note up to date, and a written agreement indorsed on the back of the note to pay interest on the same, has been held to be a sufficient consideration for an agreement to extend the time of payment of the note;<sup>2</sup> and it is said to be well settled that the payment of interest in advance will uphold an agreement for forbearance, and that such agreement will discharge the surety.<sup>3</sup> A note given for payment of interest in advance is a good consideration for an extension of time of payment.<sup>4</sup>

An agreement in writing, between the maker and holder of a promissory note, for the payment of an increased rate of interest thereon, is a good consideration

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<sup>1</sup> Vore v. Woodford, 29 Ohio St. 245.

<sup>2</sup> Chute v. Pattee, 37 Me. 102.

<sup>3</sup> Bagley v. Buzzell, 19 Me. 88; Lime Rock Bank v. Mallett, 34 Me. 547; S. C. 42 Me. 349; Hunt v. Postlewait, 28 Iowa, 427; Flynn v. Madd, 27 Ill. 323; Dunham v. Downer, 31 Vt. 249; The Bank v. Pearce, 31 Vt. 711; Dubuisson v. Folkes, 30 Miss. 432; Preston v. Henning, 6 Bush. 556; Christner v. Brown, 16 Iowa, 136; Randolph v. Flemming, 59 Ga. 776. But see Hosea v. Rowley, 57 Mo. 357; Leeper v. McGuire, 57 Mo. 360; Hemery v. Marksbery, 2d. 399.

<sup>4</sup> Robinson v. Miller, 2 Bush (Ky.) 179. See Gahn v. Niemcewicz, 11 Wend. 312.

for an extension of the time of payment.<sup>1</sup> But it has been held that an agreement to pay the same rate of interest specified in a promissory note, though greater than the legal rate, is not a sufficient consideration for a promise to extend the time of payment.<sup>2</sup> And in a recent case it was said to be well settled, by the very decided weight of authorities, that there must be not only a *sufficient* but a *new* consideration to support an agreement to extend the time of payment.<sup>3</sup>

The execution of a deed of trust by the principal debtor, by which exempt property is made liable for the payment of the demand,<sup>4</sup> the purchase of property by the debtor of the creditor, at the request of the creditor, and the execution by the debtor to the creditor of his note and mortgage therefor,<sup>5</sup> or the giving of a note for a specified sum of money<sup>6</sup>, will be a good consideration for an extension of time of payment. But a promise to pay interest during forbearance,<sup>7</sup> or a promise to pay the debt at a future day, or, in default of payment, to deliver a specific article in payment,<sup>8</sup> or a part payment of the debt after it has all become due and payable,<sup>9</sup> will not be such a consideration as will support a contract to extend the time of payment, and thereby discharge a surety.

If the extension of time is granted upon the promise

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<sup>1</sup> Huff v. Cole, 45 Ind. 300. But see Leeper v. McGuire, 57 Mo. 360; Hemery v. Marksberry, 57 Mo. 399.

<sup>2</sup> Abel v. Alexander, 45 Ind. 523; S. C. 15 Am. R. 270; Harter v. Moore, 5 Blackf. 367; Hunt v. Postlewait, 28 Iowa, 427.

<sup>3</sup> Abel v. Alexander, 45 Ind. 523; S. C. 15 Am. R. 270; and see Meniffee v. Clark, 35 Ind. 304; Clark County v. Covington, 26 Miss. 470.

<sup>4</sup> Semple v. Atkinson, 64 Mo. 504.

<sup>5</sup> Dunham v. Downer, 31 Vt. 249.

<sup>6</sup> M'Comb v. Kitridge, 14 Ohio, 348.

<sup>7</sup> Reynolds v. Ward, 5 Wend. 375. But see Fowler v. Brooks, 13 N. H. 240.

<sup>8</sup> Goran v. Binford, 25 Miss. 151.

<sup>9</sup> Roberts v. Stewart, 31 Miss. 664; King v. State Bank, 4 Eng. 185; Caldwell v. McVicar, Id. 418.

of the principal debtor to pay the debt out of the proceeds of a particular judgment, or, if that failed, then out of a particular note, the surety will not be discharged, as the creditor has no means of enforcing either promise.<sup>1</sup>

A payment upon a debt before it is due is a sufficient consideration for an extension of credit.<sup>2</sup> But it is said that a giving of further time, as to the residue of the debt, on condition that a certain portion is paid presently, is not such an extension of credit as will discharge the surety.<sup>3</sup>

SECTION II.—*Extension of time on usurious consideration.*

The question as to whether an unexecuted agreement, tainted with usury, can yet be valid, and operate as a sufficient consideration for an agreement to extend the time of payment of a note, so as to discharge a surety, has been one giving rise to conflicting decisions, owing to the want of harmony in the usury laws of the several States.

In Wisconsin, such an agreement being void as to both parties, does not discharge the surety.<sup>4</sup> In Mississippi, such an agreement will discharge a surety not consenting to the contract for delay.<sup>5</sup> In Illinois, if the principal has paid usury for an extension of time, and the surety pleads the agreement to extend in discharge of his liability, the creditor cannot overcome the defense by showing usury.<sup>6</sup> In Indiana, it has repeatedly been held that the payment of usurious interest in advance is a suf-

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<sup>1</sup> Wadlington v. Gary, 7 S. & M., 522.

<sup>2</sup> Austin v. Dorwin, 21 Vt. 38; Newsman v. Finch, 25 Barb. 175.

<sup>3</sup> Jenkins v. Clark, 7 Ham. 72.

<sup>4</sup> Meiswinkle v. Jung, 30 Wis. 361.

<sup>5</sup> Brown v. Prophit, 53 Miss. 649.

<sup>6</sup> Wittmer v. Ellison, 72 Ill. 301; Danforth v. Semple, 73 Ill. 170.

ficient consideration to support an agreement to extend the time of payment of the principal,<sup>1</sup> although the usurious interest might be recovered back in an independent action, or might be recouped in an action on the note. The decisions rest upon the ground that the *use* of the usurious interest constitutes a sufficient consideration.

In Georgia, an agreement to extend the time of payment of a note, in consideration of the payment of usurious interest, together or with the actual receipt of a part of such interest, will discharge the sureties.<sup>2</sup>

A promise to pay usurious interest, in consideration of an extension of the time of payment, will not, in Alabama, discharge the surety, the promise being void under the statutes of that State ; but whether, if the interest had actually been paid at the time of the extension, the surety would have been discharged, is an open question.<sup>3</sup> In Iowa, the surety will be discharged by an extension of time without his assent, although the consideration for the agreement was usurious.<sup>4</sup>

In Vermont, a mere executory agreement between the holder and maker of a note, for the payment of usurious interest, is not a sufficient consideration for an extension of time ; and if the usurious interest be, in fact, paid at the expiration of the extended credit, it will not discharge the surety.<sup>5</sup>

In New York, an agreement to extend the time of

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<sup>1</sup> *Harbert v. Dumont*, 3 Ind. 346; *Redman v. Deputy* 26 Ind. 338 ; *Calvin v. Wiggam*, 27 Ind. 489 ; *Cross v. Ward*, 30 Ind. 378. But an executory agreement for the payment of usurious interest, or its payment at the expiration of the extended time, is not a sufficient consideration for the extension, and will not discharge the surety. *Brown v. Harness*, 16 Ind. 248 ; *Goodhue v. Palmer*, 13 Ind. 457.

<sup>2</sup> *Camp v. Howell*, 37 Ga. 312.

<sup>3</sup> *Cox v. Mobile, &c. R. R. Co.* 1 Ala. (S. C.) 335.

<sup>4</sup> *Corielle v. Allen*, 13 Iowa, 289.

<sup>5</sup> *Burgess v. Dewey*, 33 Vt. 618 ; and see *Bank of Middlebury v. Bingham*, 33 Vt. 621 ; *Turill v. Boynton*, 23 Vt. 142.



payment of a debt made on a usurious consideration, paid at the time, discharges the surety, and the creditor cannot defeat the defense by showing the usury.<sup>1</sup> But it has been intimated, if not held, that an agreement, made by a creditor with the principal debtor, to extend the time of payment of a debt, in consideration of the future payment of usurious interest, is void and will not discharge a surety; and that the distinction made by the courts between an executed and an executory consideration, in such cases, has no legal foundation.<sup>2</sup> But this decision seems to have been overruled.<sup>3</sup> And it cannot be doubted that, on both authority and principle, a usurer should be prohibited from taking advantage of his usury to avoid a contract he has entered into.

In Virginia, an executed agreement for an extension of time, entered into between the maker and creditor for a usurious consideration, operates in equity to release the surety.<sup>4</sup>

In Texas, a promise to pay usurious interest, in consideration of an agreement to give further time, will not release the surety.<sup>5</sup>

In Kentucky, it is held, that a contract for an extension, in consideration of usury paid in advance, will discharge the surety, but otherwise, if made in consideration of an agreement to pay usury thereafter;<sup>6</sup> and in Alabama, it is held, that a usurious contract to give day

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<sup>1</sup> *Draper v. Trescott*, 29 Barb. 401; *Billington v. Waggoner*, 33 N. Y. 31.

<sup>2</sup> *Vilas v. Jones*, 1 N. Y. 274.

<sup>3</sup> *La Farge v. Herter*, 9 N. Y. 241; *Billington v. Waggoner*, 33 N. Y. 31, 36. See *Fernan v. Doubleday*, 3 Lans. 216; *National Bank of Gloversville v. Place*, 15 Hun, 564; *Church v. Maloy*, 70 N. Y. 63.

<sup>4</sup> *Armstead v. Ward*, 2 P. & H. (Va.) 504.

<sup>5</sup> *Payne v. Powell*, 14 Texas, 600.

<sup>6</sup> *Duncan v. Reed*, 8 B. Mon. 332; *Patton v. Shanklin*, 14 B. Mon. (Ky.) 15. See *Scott v. Hall*, 6 B. Mon. 285.

of payment will not discharge the surety,<sup>1</sup> unless the money is paid.<sup>2</sup>

In Missouri, it is held that payment of interest in advance is a sufficient consideration for an agreement to extend time of payment, even if the payment of interest be at a usurious rate; and that one who signs a note as joint maker will be allowed the benefit of this rule as against an indorser for value, if it appears that such apparent joint maker is really a surety, and the note was executed by him, and was taken by the indorser with the understanding that he should occupy that position.<sup>3</sup>

In Tennessee, it is held that a surety is not discharged by an executed usurious agreement for delay between the principal debtor and the creditor, although made without the surety's knowledge or assent.<sup>4</sup>

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<sup>1</sup> *Gilder v. Jeter*, 11 Ala. 256.

<sup>2</sup> *Kyle v. Bostick*, 10 Ala. 589. For the law in Pennsylvania, see *Hartman v. Danner*, 74 Penn. St. 36.

<sup>3</sup> *Stillwell v. Aaron* (Mo. Sup. Ct. April Term, 1879), citing, *Smarr v. Schnitter*, 38 Mo. 479; *Lime Rock Bank v. Mallett*, 34 Me. 547; *Bank v. Woodward*, 5 N. H. 99; *Wright v. Bartlett*, 43 N. H. 548; *Montague v. Mitchell*, 28 Ill. 485; *Kennedy v. Evans*, 31 Id. 258; *Myers v. First National Bank*, 78 Id. 258; *Cross v. Wood*, 30 Ind. 378; *White v. Whitney*, 51 Id. 124; *Vilas v. Jones*, 10 Paige, 76; *Miller v. McCan*, 7 Id. 451; *Kenningham v. Bedford*, 1 B. Monr. 325; *Austin v. Dorwin*, 21 Vt. 38; 72 Ill. 30; 2 N. H. 333; 6 Id. 504. In most of the above cases it was held, that payment of usurious interest is a sufficient consideration for the promise to extend the time of payment. The contrary was held in *Wiley v. Hight*, 39 Mo. 132; in the *Farmers' & Traders' Bank v. Harrison*, 57 Id. 506; and in *Marks v. Bank of Mo.* 8 Id. 318, in which Judge Scott expressly stated, as the ground of that decision, "that the usurious interest might have been recovered back the next moment after it was paid." Such is not the law at present in this State. *Ransom v. Hays*, 39 Mo. 445; *Rutherford v. Williams*, 42 Id. 18. If usurious interest be paid it cannot be recovered back, and if one make an agreement to extend the time of payment of a note, or other money demand, in consideration of usury paid, the agreement is binding upon him. If the consideration be a promise to pay usury, as this promise could not be enforced, and would not maintain an action, the contract would not bind the other party. The distinction is between executed and executory contracts. See 21 Alb. Law. J. 215.

<sup>4</sup> *Howell v. Sevier*, 1 Lea, 360; S. C. 27 Am. R. 771. See *McLin v. Brakebill*, 21 Alb. Law. J. 54.

SECTION 12.—*Giving time to one of several sureties.*

Giving time to one of two sureties on a promissory note will not discharge the other, though the first signed his name on the face and the other on the back of the note ;<sup>1</sup> at least, a valid contract for an extension of time, made by the creditor with one of several sureties, will not discharge the others from the entire debt, but only from such part of the debt as the first surety would be bound to contribute towards its payment.<sup>2</sup>

SECTION 13.—*Giving time to principal, but reserving rights against the sureties.*

Where, in an agreement between a creditor and the principal debtor, extending the time of payment, the remedies against the sureties are reserved, the agreement does not operate as an absolute, but only as a qualified and conditional suspension of the right of action. The stipulation, in that case, is treated in effect as if it was made in express terms subject to the consent of the surety, and the surety is not thereby discharged.<sup>3</sup> The ground upon which a surety is held discharged, when further time for payment is given to the principal debtor, is that the rights of the surety are varied, as he cannot then, when the debt is due and payable, make payment, and

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<sup>1</sup> Draper v. Weld, 13 Gray (Mass.), 580.

<sup>2</sup> Ide v. Churchill, 14 Ohio, N. S. 372. But see Crosby v. Wyatt, 10 N. H. 318.

<sup>3</sup> Calvo v. Davies, 73 N. Y. 211 ; Story's Eq. Jur. § 326 ; Bangs v. Strong, 10 Paige 18 ; Kearsley v. Cole, 16 M. & W. 128 ; Oriental Financial Corporation v. Overend, 7 H. L., Cas. 348 ; Boaler v. Mayor, 19 C. B., N. S. 76 ; Wagman v. Hoag, 14 Barb., 232 ; Viele v. Hoag, 24 Vt. 46 ; Wyke v. Rogers, 12 Eng. L. and Eq. 162 ; Claggett v. Salmon, 5 Gill and J. 314 ; Willis v. De Castro, 4 C. B. N. S. 215 ; Hubbell v. Carpenter, 5 N. Y. 171 ; Lohier v. Loring, 6 Cush. 537 ; Yates v. Donaldson, 5 M. D. 389 ; Hunt v. Knox, 34 Miss. 655.

then put himself in the place of the creditor, according to the original implied contract, and enforce repayment from the principal. But where the remedies are reserved against the sureties, notwithstanding the new agreement with the principal, the situation of the sureties is not varied, and the rule does not apply. When the creditor proceeds against the surety in such case, and the surety pays, he is entitled to the place of the creditor, as it was originally, and he may in turn enforce payment from the principal, who cannot set up against him the new arrangement with the creditor, in which the remedies against the surety were expressly reserved, and, in consequence, his resulting rights were also reserved.<sup>1</sup>

SECTION 14.—*Want of knowledge by the creditor of the existence of the relation.*

The fact that one of two or more joint debtors is a surety for the others, as between themselves, may or may not be known to the creditor. If the fact is not known, the creditor is unaffected by it;<sup>2</sup> if it is, he is bound, in any subsequent action he may take with the principal, respecting the debt, to regard the sureties' equities.<sup>3</sup>

In regard to knowledge on the part of the creditor that a party to a note is a surety for the maker, it is settled that where the note remains in the hands of the payee, he is presumed to know the relation which the other parties to the note sustain to each other.<sup>4</sup> But where the note has been transferred to an assignee, an agreement between

<sup>1</sup> Boulton v. Stubbs, 18 Ves. 20, 22; Morgan v. Smith, 70 N. Y. 537.

<sup>2</sup> See Agnew v. Merritt, 10 Minn. 308; Kaighn v. Fuller, 1 McCarter (N. J.) 419; Ellwood v. Deifendorf, 5 Barb. 398; Nichols v. Parsons, 6 N. H. 30; Debeery v. Adams, 9 Yerg. 52; Smith v. Sheldon, 35 Mich. 42. See *ante*, p. 243.

<sup>3</sup> Smith v. Sheldon, 35 Mich. 42.

<sup>4</sup> Ward v. Stout, 32 Ill. 399; Champion v. Robertson, 4 Bush. (Ky.) 17.

him and the maker, extending the time of payment, will not discharge the surety, unless he had, at the time, knowledge of the relation ; and this the surety must allege and prove.<sup>1</sup>

SECTION 15.—*Statutory extension of time.*

In respect to the effect of an extension by statute of the time within which a public officer must perform the acts contracted for in his official bond, the cases are not harmonious. In Virginia, an extension, by statute, of the time in which a public officer is required to settle his accounts, and make payment of the public moneys in his hands, is not deemed such an extension as will discharge the sureties on his bond.<sup>2</sup> On the other hand, it is held in Missouri, that a statutory extension of the time of a collector of taxes to pay over his collections operates to discharge the sureties on his bond previously given.<sup>3</sup> This doctrine is based upon the principle that a State cannot, by a legislative act, materially modify a contract between herself and a citizen any more than she can impair the obligations of a contract between citizens ; and that any act by an individual creditor extending the time of payment, which would discharge the surety on his bond, will have the same effect when the act is that of a State. This doctrine has been expressly recognized and directly held in other States.<sup>4</sup>

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<sup>1</sup> *Neel v. Harding*, 2 Met. (Ky.) 247. See *Agnew v. Merritt*, 10 Minn. 308 ; *Davenport v. King*, 63 Ind. 64.

<sup>2</sup> *Smith v. Commonwealth*, 25 Gratt. 780. See, also, *State of Maryland v. Carleton*, 1 Gill. 249.

<sup>3</sup> *State to the use of Carroll County v. Roberts*, 68 Mo. 234 ; S. C. 30 Am. R. 788.

<sup>4</sup> See *Prairie v. Jenkins*, 75 N. C. 546 ; *Davis v. People*, 1 Gilm. 409 ; *People v. McHatton*, 2 Gilm. 639 ; *Johnson v. Hacker*, 8 Heisk. 388.

SECTION 16.—*By the taking of other or collateral security.*

In order that an extension of time of payment shall have the effect of discharging a surety, the extension must operate on the debt itself.<sup>1</sup> The mere fact that the holder of a bond has accepted collateral security, which does not mature until after the maturity of the bond, and which bears a higher rate of interest than the original bond, and has accepted interest thereon, will not discharge the surety.<sup>2</sup> And generally the mere taking of collateral security, for the purpose of better securing the payment of the original debt, will never discharge the sureties thereto,<sup>3</sup> no matter when the collateral security becomes due.<sup>4</sup>

If the creditor accepts, in payment of the debt, the draft of the principal debtor, negotiable and payable at a future day, this is such an extension of credit as will discharge the surety.<sup>5</sup>

In New York, at least, it is well settled that where the holder of a promissory note takes a new note from the debtor payable at a future day, he suspends the right of action upon the original demand, until the maturity of the last-mentioned note, and a surety in the old note, not assenting to the suspension of the right of action, is discharged from liability.<sup>6</sup> The taking of a renewal note by way of conditional payment of an existing note, and the

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<sup>1</sup> *United States v. Hodge*, 6 How. (U. S.) 279.

<sup>2</sup> *Hays v. Wells*, 34 Md. 512; *Rensen v. Graves*, 41 N. Y. 471.

<sup>3</sup> *Cruger v. Burke*, 11 Texas, 694; *Wade v. Staunton*, 5 How. (Miss.) 631; *Brengle v. Bushey*, 40 Md. 141; S. C. 17 Am. R. 586; *Twopenny v. Young* 3 B. & C. 208; *Van Etten v. Troudden*, 67 Barb. 342; *Thurston v. James*, 6 R. I. 103; *Austin v. Curtis*, 31 Vt. 64.

<sup>4</sup> *Cruger v. Burke*, 11 Texas, 694.

<sup>5</sup> *Bangs v. Mosher*, 23 Barb. 478; *Albany City Fire Ins. Co. v. Devendorf*, 43 Barb. 444.

<sup>6</sup> *Hubbard v. Gurney*, 64 N. Y. 457; *Fellows v. Prentis*, 3 Denio, 512; *Dorlan v. Christie*, 39 Barb. 610; *Place v. McIlvain*, 38 N. Y. 96.

receipt of interest in advance upon it, amount to an extension of the original credit, and affect the discharge of the surety.<sup>1</sup> But the taking of a new security from the debtor, payable at a future day, for an old debt past due, without an agreement to extend the time of payment, does not discharge the surety.<sup>2</sup>

There is a broad distinction between the taking of a new or other obligation, as security collateral to a debt which still remains in existence, and the taking of such obligation in exchange for the original debt. If a creditor accepts from his debtor a valid obligation, payable in the future, in exchange for a present indebtedness, this will be such a giving of time as will discharge the surety.<sup>3</sup> But, in the absence of some agreement to that effect, the taking of the debtor's promissory note for the amount mentioned in a bond held by the creditor will not suspend his right of action on the bond, or discharge the surety therein.<sup>4</sup> It will be found, on examination, that in the cases in which the time for the payment of the original debt has been held to have been extended, upon receipt of a collateral security, there was an express agreement to that effect,<sup>5</sup> or a new agreement was made and a substituted contract entered into.<sup>6</sup>

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<sup>1</sup> First National Bank *v.* Leavitt, 65 Mo. 562.

<sup>2</sup> Elwood *v.* Diefendorf, 5 Barb. 398. See Cary *v.* White, 52 N. Y. 138.

There is a distinction to be observed between taking the note of a third person as collateral security for a debt, and taking the note of the principal debtor for the same purpose. The mere acceptance by the creditor of the note of a third person, payable in the future, as collateral security for an obligation past due, will not, in the absence of an agreement to that effect, suspend the right of action on the original obligation, and consequently will not discharge the surety thereon who has not consented to the taking of the additional security. Van Etten *v.* Troudden, 67 Barb. 342.

<sup>3</sup> Chicksaw County *v.* Pitcher, 36 Iowa, 594.

<sup>4</sup> Pain *v.* Voorhees, 26 Wis. 552.

<sup>5</sup> See Merchants' and Farmers' Bank *v.* Wixon, 42 N. Y. 438.; Jennison *v.* Stafford, 1 Cash, 168.

<sup>6</sup> See Cary *v.* White, 52 N. Y. 138, 143; Howell *v.* Jones, 1 C. M. & R.

SECTION 17.—*By alteration or merger of principal's contract.*

Nothing can be clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended, by implication, beyond the terms of his contract. To the extent, and in the manner, and under the circumstances pointed out in his obligation, he is bound, and no further. It is not sufficient that he may sustain no injury by a change in the contract, or that it may even be for his benefit. He has a right to stand upon the very terms of his contract; and if he does not assent to any variation of it, and a variation is made, it is fatal.<sup>1</sup> The reason upon which the rule is founded is, that the surety has never made the contract upon which it is sought to charge him. His answer is, if it is sought to charge him upon the altered contract, that he never made any such bargain; and if upon the original contract, that such contract no longer exists, having been legally terminated by the altered or substituted contract made by the parties. In either contingency, the answer furnishes a complete defense.<sup>2</sup> The rule is absolute that there shall be no transaction with the principal debtor without acquainting the person who has a part interest

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97; *Fellows v. Prentis*, 3 Denio, 512. But see *Hubbard v. Gurney*, 64 N. Y. 457, 468.

<sup>1</sup> *Miller v. Stewart*, 9 Wheat. 680; *Grant v. Smith* 46 N. Y. 93; *Whirton v. Hall*, 5 Barn. and Cress. 369; *Paine v. Jones*, 76 N. Y. 274, 279; *Bangs v. Strong*, 4 N. Y. 315; *Calvo v. Davis*, 73 N. Y. 211; *Gahn v. Niemcewicz*, 11 Wend. 312; *United States v. Corwine*, 1 Bond, 339; *Wortham v. Brewster* 30 Ga. 112; *Ide v. Churchill*, 14 Ohio (N. S.), 372; *Judah v. Zimmerman*, 22 Ind. 388; *Gower v. Holloway*, 13 Iowa, 154; *General Steam, &c. Co. v. Rolt*, 6 C. B. (N. S.) 550; *Gardiner v. Harback*, 21 Ill. 129; *St. Albans' Bank v. Dillon*, 30 Vt. 122; *Taylor v. Johnson*, 17 Ga. 521; *Rowan v. Sharps, &c. Co.* 33 Conn. 1; *Blakely v. Johnson*, 13 Bush. (Ky.) 197; *Coburn v. Webb*, 56 Ind. 96; and see *Lemay v. Williams*, 32 Ark. 166.

<sup>2</sup> *People v. Vilas*, 36 N. Y. 459.



in it.<sup>1</sup> The law requires that if there is any agreement between the principals, with reference to a contract to the performance of which another is bound as surety, he shall be consulted in regard to any proposed alteration; and if he is not, or, being consulted, does not consent to the alteration, he will be no longer bound, and the court will not inquire whether it is or is not to his injury.<sup>2</sup> The fact that the alteration of the original contract or obligation is made by the order of the court will not change the rule.<sup>3</sup>

But in order that a variation of the original contract shall have the effect of discharging the surety, the alteration must be, in some sense, material,<sup>4</sup> and made by the parties<sup>5</sup> without the consent of the surety,<sup>6</sup> with intent to change the effect of the contract,<sup>7</sup> and with knowledge, on the part of the creditor, at the time of the act, of the existence of the relation of principal and surety.<sup>8</sup> If a note, signed by a principal and surety, is altered by the payee or by the principal, at the request of the payee, before its delivery, without the consent of the surety, by

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<sup>1</sup> *Calvo v. Davies*, 8 Hun. 222; S. C. 73 N. Y. 211.

<sup>2</sup> *Grant v. Smith*, 46 N. Y. 93; *Paine v. Jones*, 76 N. Y. 274; *Bangs v. Strong*, 7 Hill, 250.

<sup>3</sup> *Sage v. Strong*, 40 Wis. 375.

<sup>4</sup> *Arnold v. Jones*, 2 R. I. 345; *Blair v. Bank of Tennessee*, 11 Humph. 84; *Brown v. Straw*, 6 Neb. 536; *Humphreys v. Crane*, 5 Cal. 173.

If a promissory note, payable to a partnership, under one name, is altered by the maker and payee so as to be payable to the same partnership, under another name, the alteration will not discharge the surety. *Arnold v. Jones*, 2 R. I. 345. If the alteration of a note or bill is not in any material part, or consists in the insertion of words which do not affect the rights and responsibilities of the parties, the instrument will still be valid, in the absence of any fraudulent intent to change its legal effect. *Blair v. Bank of Tennessee*, 11 Humph. 84.

<sup>5</sup> *Boyd v. McConnell*, 10 Humph. 68.

<sup>6</sup> *Huntington v. Finch*, 3 Ohio, N. S. 445; *Broughton v. West*, 8 Ga. 248; *Gardiner v. Harback*, 21 Ill. 129.

<sup>7</sup> *Nevins v. De Grand*, 15 Mass. 436.

<sup>8</sup> *Burke v. Cruger*, 8 Texas, 66.

the addition of the words, "interest payable annually,"<sup>1</sup> or "semi-annually,"<sup>2</sup> or "to bear legal interest,"<sup>3</sup> or words fixing the rate of interest,<sup>4</sup> or by changing the date,<sup>5</sup> or by changing the amount of the note,<sup>6</sup> or by erasing<sup>7</sup> or adding the word "surety,"<sup>8</sup> or by changing the medium of payment, by adding a memorandum at the bottom containing an agreement to pay the note in gold, no previous understanding having been had with the surety that the note was to be paid in specie,<sup>9</sup> or by erasing words providing for payment, in gold or its equivalent,<sup>10</sup> the surety will be discharged.

<sup>1</sup> *Marsh v. Griffin*, 42 Iowa, 403.

<sup>2</sup> *Fulmer v. Seitz*, 68 Penn. St. 237; *Neff v. Horner*, 63 Penn. St. 327; *Dewey v. Reed*, 40 Barb. 16.

<sup>3</sup> *Locknane v. Emmerson*, 11 Bush (Ky.), 69; *Kountz v. Hart*, 17 Ind. 329.

<sup>4</sup> *Hart v. Clouser*, 30 Ind. 210; *Warrington v. Early*, 75 Eng. C. L., 763; *Glover v. Robbins*, 40 Ala. 219.

<sup>5</sup> *Britton v. Dierker*, 46 Mo. 591; *Pelton v. Prescott*, 13 Iowa, 567; *Stevens v. Graham*, 7 S. & R. 505; *Hacker v. Jamison*, 2 W. & S. 438; *Muller v. Gilleand*, 19 Penn. St. 119; *Bank of the United States v. Russell*, 3 Yeates, 391; *Wood v. Steele*, 9 Wall. 80; *Lisle v. Rogers*, 18 B. Mon. 528; *Brown v. Straw*, 6 Neb. 536; S. C. 39 Am. R. 369.

<sup>6</sup> *Goodman v. Eastman*, 4 N. H. 455; *Greenfield Savings Bank v. Stowell*, 123 Mass. 197; S. C. 25 Am. R. 67.

<sup>7</sup> *Laub v. Paine*, 46 Iowa, 550. But see *Humphreys v. Crane*, 5 Cal. 173.

<sup>8</sup> *Robinson v. Reed*, 46 Iowa, 219.

<sup>9</sup> *Hanson v. Crawley*, 41 Ga. 303.

<sup>10</sup> *Church v. Howard*, 17 Hun, 5.

The rule is well settled that the alteration of a note, in any material part, renders it wholly invalid as against a party not consenting thereto, even in the hands of an innocent purchaser. *Palmer v. Sargent*, 5 Neb. 225; *Brown v. Straw*, 6 Id. 536; *Wait v. Pomeroy*, 20 Mich. 425; *Benedict v. Cowden*, 49 N. Y. 396; *Bruce v. Wescott*, 3 Barb. 376. It has been held that the insertion of the words "or order" in a note not before negotiable (*Bruce v. Wescott* 3 Barb. 874; *Haines v. Bennett*, 11 N. H. 181; *Pepoor v. Stagg*, 1 Nott and McCord, 102), or appointing a particular place of payment, where none was stated in the note as signed (*Nazro v. Fuller*, 24 Wend. 374; *Woodworth v. Bank*, 19 Johns. 391; 1 Smith's Lead. Cas. 1172), or inserting the name of the second indorser as payee in the body of the note, (*Aldrich v. Smith*, 37 Mich. 468), or adding an interest clause (*Bradley v. Mann*, 37 Mich. 1.), are material alterations.

As to alterations generally, see *Draper v. Wood*, 112 Mass. 315; S. C. 17

An accommodation note executed in blank as to date, amount, time of payment and payee, but conditioned for the payment of a specified rate of interest, and so delivered for negotiation, will cease to be binding on the accommodation maker, if the words "after maturity," are added to the interest clause, without the knowledge of the maker, but with the knowledge of the transferee.<sup>1</sup> But, if a surety, at the time of signing a note, carelessly leaves a blank line in which the words "interest payable semi-annually," are inserted, without his knowledge, by the principal, before its transfer to a *bona fide* purchaser, and afterwards pays the note without knowledge of the alteration, he cannot recover back the money paid.<sup>2</sup>

Where the owner of lands, upon which he has given a mortgage containing a clause giving him the privilege of requiring from the mortgagee a release of any portion of the mortgaged premises at any time, on making certain specified payments, conveys the lands subject to the mortgage, which the grantee assumes and covenants to pay, the grantee becomes, as to the grantor, the principal debtor, and the grantor the surety for the payment of the mortgage debt. If, with knowledge of this relation, the holder of the mortgage, by an agreement thereafter made with the grantee, and without the knowledge and consent of the grantor, abrogates this clause in the mortgage, the release of this privilege will be such an alteration of the contract as to relieve the grantor from liability on his bond for any deficiency after foreclosure. The bond and the mortgage together constitute his contract,<sup>3</sup> and prescribe the specific terms on the ob-

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Am. R. 92, 97, note; Blakey v. Johnson, 13 Bush, 254, S. C. 26. Am. R. 254, 260, note.

<sup>1</sup> Coburn v. Webb, 56 Ind. 96; S. C. 26 Am. R. 15; Franklin Fire Ins. Co. v. Courtney, 60 Ind. 134.

<sup>2</sup> Blakey v. Johnson, 13 Bush, 197; S. C. 26 Am. R. 254.

<sup>3</sup> Paine v. Jones, 76 N. Y. 274.

servance of which his liability depends. In such a case every change or alteration would be material.<sup>1</sup> But, in the absence of notice of any change in the position of the mortgagor, and of any request to foreclose, a mortgagee out of possession may rely upon the personal liability of his debtor, and recover on the bond, or, on foreclosure, may hold him liable for the deficiency.<sup>2</sup>

If the alteration is made with the knowledge and consent of the surety,<sup>3</sup> or, if with full knowledge of all the facts, he subsequently assents to it,<sup>4</sup> he will not be discharged. If a note has been altered in some material particular without the knowledge of the surety, but is restored to its original form before transfer to an innocent purchaser,<sup>5</sup> or, if an erasure has been made by mistake and the cancelled words restored,<sup>6</sup> or a forged name is erased from a bond before its delivery,<sup>7</sup> the surety will not be discharged; and, if the alteration is made by a stranger in good faith, and without the participation of the payee,<sup>8</sup> the alteration will not defeat the payee's right to recover on the instrument as it was before the alteration.

An alteration of a promissory note which does not affect its legal import does not avoid it. But where the date of a sealed note is changed, at the request of the payee, so as to postpone the operation of the statute of limitations, a surety, not assenting to the alteration, will

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<sup>1</sup> *Ludlow v. Simond*, 2 Cai. Cas. 57; *Rees v. Barrington*, 2 Ves. 540.

<sup>2</sup> *Marshall v. Davies*, 78 N. Y. 414.

<sup>3</sup> *Gardiner v. Harback*, 21 Ill. 129. See *Reddish v. Watson*, 5 Ohio, 510; *Baldwin v. Western Reserve Bank*, 5 Ohio, 573; *Hunter v. Jett*, 4 Rand, 101; *Hollier v. Eyre*, 9 Clark. & F. 1; *Voiles v. Green*, 43 Ind. 374.

<sup>4</sup> *Sage v. Strong*, 40 Wis. 575.

<sup>5</sup> *Shepard v. Whetstone*, Iowa Sup. Ct. June, 1879. But see *Locknane v. Emmerson*, 11 Bush (Ky.), 69.

<sup>6</sup> *Nevins v. De Grand*, 15 Mass. 436.

<sup>7</sup> *York, &c. Ins. Co. v. Brooks*, 51 Me. 506.

<sup>8</sup> *Boyd v. McConnell*, 10 Humph. 68.

be discharged, although the change was made in his presence.<sup>1</sup>

The erasure of the name of a surety to a bill or note, in pursuance of an agreement between the surety and payee, will not discharge the principal.<sup>2</sup> But, where a name of a co-surety is erased, without the knowledge or consent of another surety who executed it at the same time, the latter will be discharged.<sup>3</sup> If a public officer presents his bond, signed and sealed, for approval, but without any penalty expressed therein, and this is afterwards inserted in his presence and with his approval, but in the absence of the sureties, he will be bound by the bond, but his sureties will not be liable.<sup>4</sup> So, if a defendant in replevin, executes a bond with sureties, to obtain a return to him of the property seized by the officer, and afterwards, with the knowledge and consent of the officer, but without the knowledge or consent of the sureties, erases his name from the bond, the sureties will not be liable thereon.<sup>5</sup> But, if a bond from which the name of a surety has been erased, and which is therefore void as to the other sureties, is presented to other persons who sign as sureties, they are bound by their undertaking, although they were ignorant of the circumstances of the erasure, and of the fact that the other sureties on the bond were released by the erasure.<sup>6</sup> So, if the name of one of the sureties be stricken out, and the name of another inserted, the original sureties are

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<sup>1</sup> *Miller v. Gilleland*, 19 Penn. 119.

<sup>2</sup> *Huntington v. Finch*, 3 Ohio, N. S. 445; *Broughton v. West*, 8 Ga. 248.

<sup>3</sup> *Smith v. United States*, 2 Wal. (U. S.) 24; *Mitchell v. Burton*, 2 Head (Tenn.), 613; *State v. Van Pelt*, 1 Smith (Ind.), 118.

<sup>4</sup> *People v. Organ*, 27 Ill. 27.

<sup>5</sup> *Martin v. Thomas*, 24 How. (U. S.) 315.

<sup>6</sup> *Mitchell v. Burton*, 2 Head (Tenn.), 613.

discharged, and the principal and surety, whose name is inserted, are bound.<sup>1</sup>

If a seal is affixed to a promissory note signed in blank by a surety, it may be enforced by an innocent holder, in the manner and to the extent contemplated by the surety.<sup>2</sup>

A mere violation of instructions given to the maker by the surety, as to the filling of blanks left in the note at the time of its execution, will not amount to an alteration.<sup>3</sup>

A party executing a bond, knowing that there are blanks in it to be filled up by inserting particular names or things necessary to make it a perfect instrument, must be considered as agreeing that the blanks may be thus filled after he has executed the bond. If the party signing the paper shall insert, in the appropriate places, the amount of the penalty, or the names of the sureties, or any other thing he may deem of importance as affecting his interest, he may, in that way, protect himself against being bound otherwise than as he shall thus specify. But if, relying upon the good faith of the principal, the surety shall permit him to have possession of a bond, signed in blank, the surety will have clothed the principal with an apparent authority to fill up the blanks at his discretion, in any appropriate manner consistent with the nature of the obligation proposed to be given, so that, as against the obligee receiving the bond, without notice or negligence, and in good faith, the surety will be estopped to allege that he executed the paper with a reservation or upon a condition in respect of the filling of such blanks, and this, whether the blanks to be filled have reference to the penalty of the bond, the names of co-sureties, or other

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<sup>1</sup> *State v. Van Pelt*, 1 Smith (Ind.), 118. See *Davis v. Coleman*, 7 Ired. 424; *State v. Polke*, 7 Blackf. 27.

<sup>2</sup> *Fullerton v. Sturges*, 4 Ohio (N. S.), 529.

<sup>3</sup> *Waldron v. Young*, 9 Heisk. (Tenn.) 777. See *Frazier v. Gains*, 58 Tenn. 92; *Gotterupt v. Williamson*, 61 Ind., 599.

thing. The apparent authority of the principal in an obligation, which has been executed in blank by others as sureties, to fill in the blanks in an appropriate manner, may be implied from the facts and circumstances attending the transaction, and may be shown by parol; and this rule applies to instruments under seal as well as to those which are not under seal.<sup>1</sup>

When a person guarantees that another will receive and pay for an engine, and the boilers of a given capacity and power, particularly described, at an agreed price, and by an agreement of the principals, without the assent of the surety, an engine with three boilers, and of a greater capacity and power, at an additional price, is substituted, the change in the contract being material, and imposing entirely new obligations upon the contracting parties, will discharge the guarantor.<sup>2</sup>

A guarantor of the payment of rent reserved in a lease will not be discharged from liability for rent past due by a surrender of the lease, and a release of rent thereafter to accrue, without his knowledge and consent,

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<sup>1</sup> *City of Chicago v. Gage*, 22 Alb. Law. J. 356, citing *United States v. Nelson*, 2 Brock, 64; *Speake v. United States*, 9 Cranch, 28; *Smith v. Crooker*, 5 Mass. 538; *Butler v. United States*, 21 Wall, 272; *Dair v. United States*, 6 Id. 1; *Drury v. Foster*, 2 Id. 24; *Inhabitants of Berwick v. Huntress*, 53 Me. 89; *State v. Pepper*, 31 Ind. 76; *McCormick v. Bay City*, 23 Mich. 457; *State v. Young*, 23 Minn. 551; *Packard v. Sears*, 6 Ad. & El. 469; *Welland Canal Co. v. Hathaway*, 8 Wend. 480. The doctrine in *People v. Organ*, 27 Ill. 29, has not been followed. *Bartlett v. Board of Education*, 59 Ill. 364; *Texira v. Evans*, referred to, 1 Anstruther, 228; *Smith v. Board of Supervisors*, 59 Ill. 412; *Comstock v. Gage*, 91 Ill. 328.

Where a person, with others, indorses a note with a blank for the name of the payee, and in that condition leaves it with one of the parties to be negotiated, he makes such person his agent for the purpose of filling the blank, and such person is authorised to fill up the blank with the name or names of any of the indorsers he may choose. *Armstrong v. Harshman*, 61 Ind. 52; *S. C.* 28 Am R. 665; *Holland v. Hatch*, 11 Ind. 497; *Schnewind v. Hackett*, 54 Ind. 248; *Emmons v. Meeker*, 55 Ind. 321; *Emmons v. Carpenter*, Ill. 329.

<sup>2</sup> *Grant v. Smith*, 46 N. Y. 93.

as the obligation to pay the accrued rent is not changed by the change in the contract, nor does such change alter or impair any right of the guarantor.<sup>1</sup>

Where sureties have covenanted to be responsible for the performance of a contract which binds the principal to serve the covenantee for a term named, at a fixed salary, and to serve no one else, and this contract is subsequently changed into a contract making the compensation depend upon the quantity of work, making the term of service uncertain, and binding the principal to obey the commands of the covenantee and two other persons, this will be such a plain and palpable departure from the original undertaking that the sureties will be discharged.<sup>2</sup> So, where sureties have bound themselves for the performance of a contract for the sale of goods on commission, and the contract is changed to a consignment of goods at an agreed price, there is a material variation of the terms of the contract, and the sureties will not be liable.<sup>3</sup> So, where a person guarantees the payment of the price of goods to be sold to a third person, on a credit of six months, and after the sales of the goods and their delivery, the vendors extend the term of credit as to part of the amount, and shorten the term as to a part of the amount, by taking a third party's promissory notes therefor, having different periods of time to run, the guarantor is discharged.<sup>4</sup> When a person agrees to be accountable to anyone who will advance a specified sum of money to a person named, at nine or twelve months, and the principal debtor appropriates the guaranty to the payment of an old debt, and the purchase of

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<sup>1</sup> *Kingsbury v. Westfall*, 61 N. Y. 356.

<sup>2</sup> *Bagley v. Clarke*, 7 Bosw. 94.

<sup>3</sup> *Wilson v. Edwards*, 6 Lans. 134.

<sup>4</sup> *Henderson v. Marvin*, 31 Barb. 297.



goods, this is a departure from the terms of the guaranty, and the guarantor is not liable.<sup>1</sup>

When a lease contains a stipulation that possession shall be given on a specified day, and the premises delivered in as good condition as when received, a guarantor of the lease will be discharged by a contemporaneous agreement between the lessor and lessee that the building should be remodelled by the lessor, at an expense of \$1,500, and possession to be given on the completion of the improvements.<sup>2</sup> The payee of a note may obtain the signature of an additional surety without the consent of the prior sureties, and without discharging them.<sup>3</sup>

SECTION 18.—*By change of the duties of the principal debtor.*

As has been stated, the alteration of a principal's contract by order of the court will discharge a surety, as well as when the alteration is the voluntary act of the party.<sup>4</sup> But whether, when the alteration of the contract is by statute, the same rule is applicable, is not so clear. This question has been frequently presented in relation to the liability of sureties on official bonds, when the duties of the principal have been materially changed by statute after the execution of the bonds.

Lord Campbell said, "It may be considered settled law, that where there is a bond of suretyship for an officer, and by the act of the parties or act of Parliament, the nature of the office is so changed that the duties are materially altered, so far as it affects the peril of the

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<sup>1</sup> Wright v. Johnson, 8 Wend. 512.

<sup>2</sup> Farrar v. Kramer, 5 Mo. App. 167.

<sup>3</sup> Crandall v. Auburn Bank, 61 Ind. 349. But see Hamilton v. Hooper, 46 Iowa, 515; Hall v. McHenry, 19 Iowa, 521. Gardner v. Walsh, 5 El. and Bl. 83; Robinson v. Reed, 4 M. & R. 349.

<sup>4</sup> Sage v. Strong, 40 Wis. 575.

sureties the bond is avoided.”<sup>1</sup> In an action in the United States Supreme Court, founded upon a bond of a collector of customs, conditioned that he had truly executed and discharged, and should continue to execute and discharge, all the duties of collector according to law, it was assigned as a breach that he had failed to account for, and pay over, the money received by him in his official capacity. To this the surety in the bond interposed as a defense, that the duties, risks and responsibilities of the collector were raised, enlarged and changed during his official term, and that consequently the liability of the surety was avoided and discharged. The court held, that if, after an official bond is signed, the nature of the contract be changed by law, the bond ceases to be obligatory ; but if duties are added, differing in their nature from these belonging to the office when the official bond was given, this will not render the bond void as a security for the performance of the duties first assumed, and it will still remain a valid obligation for what it was originally intended to secure.<sup>2</sup> In New York, it has been held, that the sureties upon the bond of a public officer are not discharged by the imposition on their principal of new duties, of a similar nature and character, by an act of the Legislature passed subsequent to the execution of the bond ; and that a public officer takes his office with the obligation to perform all the duties incident to, or connected with it, then existing, or that may be added by the Legislature, provided that the character of the duties remains the same.<sup>3</sup> But, in a later case, it is held, that where the law is changed after

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<sup>1</sup> *Phybus v. Gibbs*, 6 Ellis & Black. 903 ; 88 Eng. C. L. R. 903.

<sup>2</sup> *Gausson v. United States*, 97 U. S. (7 Otto), 584.

<sup>3</sup> *People v. Vilas*, 36 N. Y. 459. See *Coulter v. Morgan*, 12 B. Mon. 278 ; *Mooney v. State*, 13 Mo. 7 ; *Walker v. Chapman*, 22 Ala. 46 ; *Graham v. Washington Co.* 9 Dana, 184 ; *Governor v. Ridgeway*, 2 Ill. 14 ; *Camphor v. People*, 12 Ill. 290.

an official bond is executed, and by the change the officer is made the custodian of funds that would not have come into his hands officially under the former law, the question whether the enlargement of the responsibilities of the officer would not discharge the sureties, must be regarded as an open question.<sup>1</sup>

In Virginia, it is held, that where new duties are imposed upon a public officer by statute, after the execution of his official bond by a surety, the surety is not absolutely discharged, but is liable to the extent of the duties lawfully covered by it, though they may not be liable as to the duties imposed since its execution.<sup>2</sup>

The effect of an arrangement between the employer and an employee, who has given bonds for the faithful discharge of his duties, with sureties, whereby the duties of such employee are varied, after the execution of the bond, without the consent of the sureties, has been frequently under consideration by the courts.

In a case in Maryland, the facts were as follows: A person appointed ticket and freight agent at a second-class railway station, executed a bond with sureties, reciting his appointment, and conditioned for the faithful performance of the duties of said office as long as he should hold the same. Subsequently, the railway company made a change in its regulations, by which the station became a first-class station, thereby increasing the amount of freight paid at the station, but leaving the duties of the agent in all respects the same as before. In an action on the bond, it was held that change in the regulations of the company did not discharge the sureties.<sup>3</sup>

In a case in Tennessee the facts were as follows: B.

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<sup>1</sup> *People v. Pennock*, 60 N. Y. 421.

<sup>2</sup> *Commonwealth v. Holmes*, 25 Gratt. 771.

<sup>3</sup> *Strawbridge v. Baltimore, &c. R. R. Co.* 14 Md. 360

was appointed ticket agent of a railway corporation at Memphis, and gave a bond, with sureties, for the faithful performance of his duties. There were two ticket offices, but the bond did not designate to which office the agent was appointed.

Subsequently the offices were consolidated, and the agent was required to perform the duties of both offices at an increased salary. It was held that the change, having been made without the consent of the sureties, they were discharged.<sup>1</sup>

In a case in New Jersey, a person was employed as a messenger in a bank, and gave a bond for the faithful performance of his duty as "assistant clerk." Subsequently, by several promotions, the last without the knowledge of the sureties in his bond, he was made assistant bookkeeper, and, from his proximity to the money drawer, in his new position, was enabled to abstract moneys from it from time to time, and was enabled to conceal his crime by means of false entries. In this case it was held that the sureties were not liable for the embezzlement.<sup>2</sup>

In England, the courts go still further. Where an agent for the sale of coal gave a bond, in which it was stated that he was to have a salary of £100 per annum, and the contract was subsequently changed to a commission on the amount of the sales, it was held that this was a material change in the contract of the parties, and relieved the sureties from responsibility.<sup>3</sup> So, where a bank, without the knowledge of the sureties, increased the salary of an agent, he undertaking to bear one fourth

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<sup>1</sup> *Mumford v. Memphis & Charleston R. R. Co.* 2 Lea, 393; S. C. 31 Am. R. 616.

<sup>2</sup> *Manufacturers' National Bank v. Dickerson*, 12 Vroom, 448; S. C. 32 Am. R. 237. To the same effect see *Northwestern Nat. Bank v. Keen*, 37 Leg. Int. 124.

<sup>3</sup> *Northern R. R. Co. v. Whinray*, 26 Eng. L. & Eq. 488.

part of all losses which he incurred by his discounts, the sureties on his bond were held discharged.<sup>1</sup>

But where a bond, given on behalf of the principal, binds the surety for every liability existing, or thereafter to be incurred by the principal, a change in the contract, as to compensation, will not affect the liability of the surety, though made without his consent.<sup>2</sup> And where the agent's duties are fixed by the bond, the mere fact that the agent has been permitted to do things outside of the business of the agency, which may have in some degree interfered with the performance of the duties prescribed by the bond, will not discharge the sureties, there being no change in the contract of the principal.<sup>3</sup>

Sureties on the bond of a sewing-machine agent are not liable for the agent's transactions outside of the territory assigned to him by the contract,<sup>4</sup> but it would be otherwise if the bond contained a reservation to the company to change the character of the employment within the scope of the company's business.<sup>5</sup>

#### SECTION 19.—*Tender by surety or principal.*

The surety may obtain his discharge from liability on his contract by a tender of the amount for which he is security. If the surety tenders to the creditor the amount due from the principal debtor, and the creditor refuses to receive it, the surety will be discharged.<sup>6</sup> A tender by the principal debtor will have the same effect.

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<sup>1</sup> Bonar v. McDonald, 1 Eng. L. & Eq., 1.

<sup>2</sup> Domestic Sewing Machine Co. v. Webster, 47 Iowa, 357.

<sup>3</sup> Home Life Ins. Co. v. Potter, 4 Mo. App. 594.

<sup>4</sup> White Sewing Machine Co. v. Mullins, 41 Mich. 339.

<sup>5</sup> Home Sewing Machine Co. v. Layman, 88 Ill. 39.

<sup>6</sup> Hayes v. Josephi, 26 Cal. 535; Joslyn v. Eastman, 46 Vt. 258; Lewis v. Van Dusen, 25 Mich. 351.

SECTION 20.—*By discharge of the principal debtor.*

As a general rule, a discharge of the principal discharges the known surety.<sup>1</sup> Thus, the cancellation of an official bond, pursuant to law, is a discharge of the sureties therein.<sup>2</sup> So, any act by which the holder of a note discharges the maker, releases the other parties to it.<sup>3</sup> And the release of the principal in a bond discharges the sureties therein.<sup>4</sup> So, if the judgment creditor, by any act, discharges the lien of judgment against the principal debtor, he, by that act, discharges the surety.<sup>5</sup>

In some States, it is provided by statute that the liability of the surety shall cease when, "from any cause," the obligation of the principal becomes extinct. By this is meant any cause dependent on the act of the creditor, and within his control.<sup>6</sup> A marriage between the principal debtor and the creditor has been held to discharge the sureties, because it extinguishes the right of the creditor to sue the principal.<sup>7</sup>

A release of the principal debtor against whom, with a surety, a joint judgment has been obtained, releases the surety.<sup>8</sup> And whenever a surety is so placed that he cannot secure himself by discharging the claim of the creditor, and proceeding against the principal, the surety will be discharged.<sup>9</sup>

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<sup>1</sup> Paddleford v. Thacher, 48 Vt. 574; Blackburn v. Beal, 21 Md. 208; Bridges v. Phillips, 17 Texas, 128; Dickeson v. Bell, 13 La. Ann. 249.

<sup>2</sup> Lockwood v. Penn, 22 La. Ann. 29.

<sup>3</sup> Lynch v. Reynolds, 16 Johns. 41; Brown v. Williams, 4 Wend. 360; Mottram v. Mills, 2 Sandf. 189.

<sup>4</sup> Kirby v. Taylor, 6 Johns. Ch. 242; s. c. Hopk. Ch. 309.

<sup>5</sup> Hollingsworth v. Turner, 44 Ga. 11.

<sup>6</sup> Phillips v. Solomon, 42 Ga. 192.

<sup>7</sup> Govan v. Moore, 30 Ark. 667.

<sup>8</sup> Anthony v. Capel, 53 Miss. 350.

<sup>9</sup> Boschert v. Brown, 72 Penn. St. 372.

But, where the extinction of the obligation of the principal is not caused by a voluntary act of the creditor, but by the law, as, for example, in bankruptcy, the obligation of the surety does not fall with the principal's obligation, but remains binding upon him.<sup>1</sup>

The satisfaction of a judgment affirmed in the Court of Appeals, discharges the sureties in the appeal bond.<sup>2</sup> And the acceptance of a new surety, by the creditor, from the principal debtor, in satisfaction of his demand, discharges both principal and surety, although the security is worthless.<sup>3</sup> And where it appears that the principal debtor has offered to pay the demand, but by an oral agreement retained the money on a new loan, the surety will be discharged.<sup>4</sup> And where the principal debt is paid the surety is discharged, no matter how, or by whom the payment is made.<sup>5</sup>

The rule as herein settled, does not, however, operate for the benefit of the principal as well as the surety; and the release of a surety by the creditor will not discharge the liability of the principal debtor,<sup>6</sup> nor will it in every case discharge the liability of a co-surety.<sup>7</sup> If the principal in a note successfully defends an action brought against him thereon, on the ground of the illegality of the obligation, the surety may plead the judgment discharging the principal, in bar to a subsequent action against him on the same note.<sup>8</sup> But, it is not every

<sup>1</sup> Ray v. Brenner, 12 Kansas, 105; Phillips v. Solomon, 42 Ga. 192.

<sup>2</sup> Gove v. Lawrence, 6 Lans. 89. And when the surety consents to the release of the principal, the consent will prevent the discharge of the surety. Osgood v. Miller, 67 Me. 174.

<sup>3</sup> Newman v. Hazelrigg, 1 Bush (Ky.), 412.

<sup>4</sup> Musgrave v. Glasgow, 3 Ind. 31.

<sup>5</sup> See Blackburn v. Beall, 21 Md. 208.

<sup>6</sup> Mortland v. Himes, 8 Barr, 265.

<sup>7</sup> Garey v. Hignutt, 32 Md. 552.

<sup>8</sup> Gill v. Morris, 11 Heisk (Tenn.), 614; 27 Am. R. 744.

judgment in favor of the principal that will discharge the surety.<sup>1</sup>

SECTION 21.—*By discharge, etc., of principal in bankruptcy.*

A certificate of discharge in bankruptcy issued to the principal debtor does not affect the liability of the surety;<sup>2</sup> nor does the consent of the creditor of a bankrupt to a resolution for a composition under the statute,<sup>3</sup> release a person liable as a surety for the debt due the creditor.<sup>4</sup>

The provisions of the statute of the United States for a composition under the supervision of the court, was taken from, and substantially follows, the provisions of the English Bankrupt Act of 1879;<sup>5</sup> and it has been determined in England, by numerous decisions, that a creditor, by participating in either of the three forms of proceeding, whether by assenting to a certificate of discharge, or by consenting to a resolution, either for a winding up through trustees, or for the acceptance of a composition proposed by the debtor, does not release or affect the liability of a surety.<sup>6</sup>

A debt due to the United States, by one who owes it as a surety only, is not barred by the debtor's discharge in bankruptcy, under the bankrupt act of 1867, the rights and remedies of the government not being divest-

<sup>1</sup> Hardin v. Johnson, 58 Ga. 522.

<sup>2</sup> Flagg v. Tyler, 6 Mass. 33; U. S. Rev. Stat. § 5118; Joner v. Hagler, 6 Jones Law (N. C.), 542.

<sup>3</sup> U. S. Stat. of June, 1874, § 17.

<sup>4</sup> Guild v. Butler, 122 Mass. 498; S. C. 23 Am. R. 378.

<sup>5</sup> Stat. 32 & 33 Vict. Ch. 71, § 126. See Ex parte Jewett, 2 Lowell, 393; Re. Whipple, Id. 404.

<sup>6</sup> Brown v. Carr, 2 Russ. 600; 5 Mo. & P. 497; Bing. 508; Megrath v. Gray, L. R. 9 C. P. 216; Ellis v. Wilmot, L. R. 10 Exch. 10; Simpson v. Henning, L. R. 10 Q. B. 406; Ex parte Jacobs, L. R. 10 Ch. 211.



ed by the general words of the statute.<sup>1</sup> But it has been held, that a discharge is a bar to an action by the United States against a surety on a collector's bond.<sup>2</sup>

Bail in error, or surety in an undertaking on appeal, for the performance of the judgment that may be given by the appellate court, are not released from their obligation by the discharge of their principal in bankruptcy, pending the appeal, unless the discharge may be interposed to prevent judgment.<sup>3</sup> Such sureties, do not, by their undertaking become liable for the debt of their principal, but their obligation is contingent and incident to the legal proceedings for the payment of the judgment that might be rendered upon the appeal. It does not become a debt until the happening of the contingency named, and is not therefore within the saving provisions of section 33 of the United States Bankrupt Act of 1867. That section only applies to sureties liable for the debts of the bankrupt existing before, and which would be discharged by the bankruptcy proceedings.<sup>4</sup>

A surety in a replevin bond is discharged by a discharge of the principal in bankruptcy,<sup>5</sup> and the sureties in an attachment bond are released by the discharge in bankruptcy of the principal before judgment is rendered against him.<sup>6</sup>

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<sup>1</sup> *United States v. Herron*, 20 Wall, 251.

<sup>2</sup> *United States v. Throckmorton*, 8 Bank Reg. 309.

<sup>3</sup> *Knapp v. Anderson*, 71 N. Y. 466; *Hall v. Fowler*, 6 Hill, 630; *Flagg v. Taylor*, 6 Mass. 34; *Burr v. Carr*, 7 Bing. 508; *Southcote v. Braithwaite*, 1 T. R. 624; *Serra e Hejo v. Hoffman*, 30 La. Ann. Part I, 67.

<sup>4</sup> *Knapp v. Anderson*, 71 N. Y. 466; *Carpenter v. Turrell*, 100 Mass. 450; *Odell v. Wootten*, 38 Ga. 224.

<sup>5</sup> *Choate v. Quinchett*, 12 Heisk. (Tenn.) 422.

<sup>6</sup> *Payne v. Able*, 7 Bush, 344; S. C. 3 Am. R. 316. In delivering the opinion of the court in this case, Lindsay, J., says:

"The act of Congress, it is true, provides that 'no discharge granted under this act shall release, discharge, or affect any person liable for the same debt, for, or with the bankrupt, either as a partner, joint contractor, indorser, security or otherwise.' But the sureties on the attachment bonds

SECTION 22.—*By discharge of surety in bankruptcy.*

A discharge in bankruptcy releases the bankrupt only from such claims against him as are provable against his estate at the time it is settled up by the assignee. If a person has become surety for the faithful performance of the duties of an agent, a discharge in bankruptcy will not release him from liability for the acts of the agent, amounting to a breach of the bond, which are subsequent to the settlement of the estate by the assignee; but he is released by the discharge from liability for acts of the agent prior to such settlement.<sup>1</sup> This results from the principle that until there is a breach there is no debt of the surety either existing or to become due which can be proved against his estate in bankruptcy.<sup>2</sup> The liability of a surety on a guardian's bond is a contingent liability within the meaning of section 19 of the Bankruptcy Act of 1867, and a discharge of the surety in bankruptcy releases him from liability on the bond.<sup>3</sup>

The sureties in a bail bond are released from all liability therein by a discharge in bankruptcy.

It has been held that a surety on a bond, given to secure the damages and costs occasioned by an injunction, is not released from liability by his discharge in bankruptcy after the execution of the bond, but before the

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were never liable for the *debts*, and did not contract to pay the same, or any portion of them. In two of the bonds they agreed and undertook that the defendant, Able, should 'perform the judgments of the court;' and in the other, that the attached property, or its value, should 'be forthcoming, and subject to the order of the court for the satisfaction of such judgment.' No judgments were, or could have been rendered against Able, and hence, the contingencies upon which they were to become liable, as sureties, have not arisen, and cannot now arise."

<sup>1</sup> Greenville, &c. R. R. Co. v. Maffet, 8 S. C. 307.

<sup>2</sup> Jones v. Knox, 46 Ala. 53; S. C. 7 Am. R. 583; Keits v. People, 72 Ill. 435; S. C. 16 Bank. Reg. 96; Simpson v. Simpson, 80 N. C. 332.

<sup>3</sup> Jones v. State, 28 Ark. 119.

determination of the suit in which the injunction issued ;<sup>1</sup> and that a surety in a bond, given to procure the release of a person arrested on *mesne* process, is not released from liability by a discharge in bankruptcy after judgment in the action in which the arrest was made, and the forfeiture of the bond, by the neglect of the principal to perform its conditions.<sup>2</sup> A surety on the official bond of a constable, is discharged from liability for a default of his principal, by the surety's discharge in bankruptcy.<sup>3</sup> But the discharge of an auctioneer in bankruptcy will release neither the principal nor his sureties from liability, on his bond for moneys received by the auctioneer as such, and improperly retained.<sup>4</sup>

SECTION 23.—*By failure to present claim against the principal's estate, &c.*

In Illinois, it is provided by the act of 1869, that a surety upon a note will be released by the failure of the payee or assignee to present the same for allowance against the estate of the deceased principal. This statute is not a mere statute of limitations, but is a part of the contract upon which the surety has a right to rely.<sup>5</sup>

When the principal debtor is adjudged a bankrupt, a failure of the creditor to present his claim for a dividend, will not release a surety of the debtor.<sup>6</sup> The lien of a judgment is discharged by not being expressly reserved in the creditor's proof of the debt in a bankruptcy court against the principal debtor, and the surety is discharged to the extent of the injury he sustains thereby. But if

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<sup>1</sup> Eastman *v.* Hibbard, 54 N. H. 504; S. C. 20 Am. R. 157.

<sup>2</sup> Woodard *v.* Herbert, 24 Me. 358.

<sup>3</sup> McMinn *v.* Allen, 76 N. C. 131.

<sup>4</sup> Jones *v.* Russell, 44 Ga. 460.

<sup>5</sup> House *v.* Trustees of Schools, 83 Ill. 368.

<sup>6</sup> Clopton *v.* Spratt, 52 Miss. 251.

the bankrupt's property is wholly exhausted by older valid liens, he will not be deemed injured.<sup>1</sup> In a recent English case, it was held that where a creditor takes from the principal debtor a note with a surety, and, as further security, a policy of life insurance, and, on the subsequent bankruptcy of the debtor, proves against his estate the full amount of the advance, without valuing the policy of life insurance, as a security, whereby it is claimed by the trustee in bankruptcy as part of the bankrupt's estate, the omission to value the policy is a mere neglect on the part of the creditor, and does not discharge the surety from all liability, but only to the extent of the value of the policy.<sup>2</sup>

A person having a claim based on a bond executed by a decedent, loses no right against the sureties by a failure to present the claim to the administrator for allowance, unless it be shown that the administrator could have paid it, had it been presented.<sup>3</sup>

#### SECTION 24.—*By imprisonment of principal.*

When a creditor has pressed his demand to judgment and execution, and for want of property of the principal debtor to satisfy the execution, has arrested and imprisoned the principal upon an execution against his person, the imprisonment is, in law, a satisfaction of the judgment, so long as it continues, and for the time bars the creditor from all other remedies for the collection of the debt. The imprisonment does not absolutely extinguish the judgment, but suspends its lien upon the real estate of the debtor, and for the time being operates as an actual satisfaction. While it continues, the creditor

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<sup>1</sup> Jones v. Hawkins, 60 Ga. 52.

<sup>2</sup> Rainbow v. Juggins, L. R., Q. B. D. 138. See Wulff v. Jay, L. R. 7 Q. B. 756.

<sup>3</sup> Pottawattamie Co. v. Taylor, 47 Iowa, 520.

can neither maintain an action on the judgment, nor enforce collateral securities for its payment; and if third persons stand in the position of sureties for the payment of the debt, by reason of having entered into a bond conditioned for the payment of any judgment that may be recovered against the debtor, so long as the debt cannot be enforced against their principal, it cannot be enforced against them.<sup>1</sup>

Under the New York practice, the sureties in an undertaking given to procure the discharge of a defendant from arrest in a civil action, may arrest and surrender their principal to the sheriff of the county where he was arrested, in their exoneration, or the defendant may surrender himself, in exoneration of his bail. In either case, the imprisonment of the principal discharges the sureties from further liability on their undertaking. This remedy, in some form, exists in every State, and is, for the most part, a mere matter of statutory practice. The surrender of the prisoner into custody is a mere performance of the condition of the undertaking.

In criminal actions, however, where the party arrested has been discharged on a recognizance for his appearance at court, the imprisonment of the principal by lawful authority whereby the sureties in the recognizance are unable to produce their principal according to its terms, depends for its effect on entirely different principles. Where a person arrested on a criminal charge, is discharged from custody on entering into a recognizance, with sureties, for his appearance at a specified term of court, to answer to the charges brought against him, and is subsequently arrested and imprisoned for another crime, by the military authorities of the United States, so that he could not be

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<sup>1</sup> *Koenig v. Steckel*, 58 N. Y., 475; and see *Jackson v. Benedict*, 13 Johns. 533; *Cooper v. Bigalow*, 1 Corv. 56; *Sunderland v. Loder*, 5 Wend. 58; *Wakeman v. Lyon*, 9 Wend. 241; *Thompson v. Parish*, 94 Eng. C. L. 683.

produced at that term according to the terms of the recognizance, the sureties will be discharged.<sup>1</sup>

So, if the principal, after entering into the recognizance, voluntarily enlists as a soldier in the United States army, where he is detained by military authority when the recognizance is called and forfeited, the surety is released from liability on the recognizance.<sup>2</sup>

Where the recognizance is conditioned that the principal shall appear, &c., and, if convicted, should render himself in execution thereof, the surrender of the principal, in execution of the judgment of the court in the case, releases the sureties in the bond.<sup>3</sup> So, the sureties in a bail-bond will be released from liability by a second arrest of their principal on the same indictment.<sup>4</sup>

In all criminal cases, where a party accused of crime is liberated on bail, the principal and sureties bind themselves that the principal shall appear before the court at the time and place appointed, and answer to the crime charged against him. The form of the recognizance is without reservation or condition, but the law excuses the sureties if they are prevented by the act of God, or by act of law, or by act of the obligee, from fulfilling the requirements of the bond.<sup>5</sup> The act of the law which will render the performance of the conditions of a bail bond impossible and, therefore, excuse a failure to produce the princi-

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<sup>1</sup> *Belding v. State*, 25 Ark. 315; S. C. 44 Am. R. 26. See *Commonwealth v. Webster*, 1 Bush. (Ky.) 616; *Shook v. People*, 39 Ill. 443; *United States v. Lloyd*, 4 Blatchf. C. C. 427.

<sup>2</sup> *People v. Cook*, 30 How. (N. Y.) 110; *People v. Cushing*, 44 Barb. 118. But see *Gingrich v. People*, 34 Ill. 448; *Huggins v. People*, 39 Ill. 241; *Shook v. People*, 39 Ill. 443; *Wininger v. State*, 23 Ind. 228.

<sup>3</sup> *Mitchell v. Commonwealth*, 12 Bush. (Ky.) 247.

<sup>4</sup> *Peacock v. State*, 44 Texas, 11; *Medlin v. Commonwealth*, 11 Bush. (Ky.) 605.

<sup>5</sup> *Taintor v. Taylor*, 36 Conn. 242; S. C. 4 Am. R. 58. *Steelman v. Mat-tix*, 9 Vroom, 247; *People v. Manning*, 8 Cow. 297; *Hillyard v. Mutual Ben. Ins. Co.* 6 Vroom, 415.

pal, must be the act of a law operative in the State where the obligation was assumed, and obligatory in its effect upon her authorities.<sup>1</sup> And the fact that the principal could not appear when called, because he was in prison in another State, to which he had been taken on a requisition of the Governor, to answer a criminal charge, and there committed, does not discharge the sureties.<sup>2</sup>

The sureties in a recognizance given to the United States are not discharged from liability by the confinement of their principal, at the time he should appear, in the penitentiary of another State, beyond the district.<sup>3</sup> Nor will the sureties for a person charged with crime be discharged because the principal was subsequently indicted for the crime, was arrested and escaped;<sup>4</sup> nor because, subsequent to the execution of the bail bond, he was arrested, tried and convicted of another crime and escaped.<sup>5</sup>

But where sureties have entered into a recognizance for the personal appearance of their principal at the next United States Circuit Court, and also at any subsequent term to be thereafter held, &c., and subsequently, without the knowledge of the sureties, a stipulation is entered upon the minutes of the court for the postponement of the trial until the determination of cases pending in

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<sup>1</sup> *Taylor v. Taintor*, 16 Wall. 366. The inability must arise wholly from the act of the law, and not in part from the neglect or omission of the contracting party. *Steelman v. Mattix*, 9 Vroom, 247; S. C. 20 Am. R. 389.

<sup>2</sup> *Taintor v. Taylor*, 36 Conn. 242; S. C. 4 Am. R. 58.

<sup>3</sup> *United States v. Van Foesen*, 1 Dill. 406. See also *Cain v. State*, 55 Ala. 170.

<sup>4</sup> *Chappell v. State*, 30 Texas, 613. But see *Smith v. Kitchens* 51 Ga. 158; S. C. 21 Am. R. 232.

<sup>5</sup> *Wheeler v. State*, 38 Texas, 173.

Under the Iowa Code, sureties upon a bail bond for the appearance of a prisoner are not discharged from liability by the fact that the default of their principal was caused by his arrest and detention by officers of justice in another county. *State v. Merrihew*, 47 Iowa, 112; S. C. 29 Am. R. 464. But see *People v. Bartlett*, 3 Hill (N. Y.) 570, where the contrary doctrine is held.

another court, they will, by this act, be released from liability.<sup>1</sup>

The act of God, which will excuse a non-performance of the conditions of a recognizance, may consist either in the sickness of the principal, preventing him from appearing at the court for which he is bound,<sup>2</sup> or his death before the term.<sup>3</sup> And the death of the principal after forfeiture of the recognizance, but before judgment thereon, exonerates the sureties.<sup>4</sup>

If the principal is in attendance during the term named in the recognizance, and the term is adjourned without any measures being taken to commit him, or otherwise secure his appearance, the recognizance will be discharged, although no record of the discharge was made.<sup>5</sup> But a mere appearance of the principal at the first day of the term will not discharge the sureties if he is absent when the case is moved for trial.<sup>6</sup>

If the principal has been arrested and removed from the county by order of a provost marshal, the sureties will not be liable for his non-appearance.<sup>7</sup> But if the sureties have allowed their principal to go to another State, where he is arrested and imprisoned, they will be liable for his failure to appear.<sup>8</sup>

Where the principal has given bail to appear and answer to an indictment, his sureties are released by the quashing of the indictment, and the principal may then depart from court without special leave;<sup>9</sup> and if the

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<sup>1</sup> *Reese v. United States*, 9 Wall. 13.

<sup>2</sup> *People v. Tubbs*, 37 N. Y. 586; *Scully v. Kirkpatrick*, 79 Penn. St. 324; S. C. 21 Am. R. 62.

<sup>3</sup> See *Steelman v. Mattix*, 9 Vroom (N. J.) 247; S. C. 20 Am. R. 389, 393.

<sup>4</sup> *State v. Cone*, 32 Ga. 663.

<sup>5</sup> *State v. Mackey*, 55 Mo. 51; *Townsend v. People*, 14 Mich. 388.

<sup>6</sup> *Commonwealth v. Coleman*, 2 Met. (Ky.) 382.

<sup>7</sup> *Commonwealth v. Webster*, 1 Bush. (Ky.) 616.

<sup>8</sup> *Witherow v. Commonwealth*, 1 Bush. (Ky.) 17.

<sup>9</sup> *People v. Felton*, 36 Barb. 429.



principal appears according to his recognizance, and gives bail for his future appearance, his sureties on his original recognizance will be discharged.<sup>1</sup>

Where the principal is in court, in custody of the sheriff, his conviction will release his sureties in a recognizance, conditioned, among other things, that the principal shall not depart without leave of the court, until his final trial, conviction or acquittal; and if he escapes after the verdict of guilty is rendered against him, his sureties are not liable.<sup>2</sup>

A surrender of the principal by one of several sureties in a bail bond will be presumed to be in the interest of the sureties, and if it discharges one it discharges all;<sup>3</sup> and if the principal is committed to jail for safe keeping, and is discharged therefrom by legal authority, although erroneously, the bail are discharged.<sup>4</sup>

#### SECTION 25.—*By act of God.*

It is a general rule, that where a party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his own contract.<sup>5</sup> A party who enters into an absolute contract, without any qualifications or exceptions, and receives from the party with whom he contracts, the consideration for such engagement, must abide by the contract, and either do the act or pay damages, his liability arising from his own direct and positive undertaking.<sup>6</sup> The principle lying

<sup>1</sup> *Schneider v. Commonwealth*, 3 Met. (Ky.) 409.

<sup>2</sup> *State v. Wilson*, 14 La. Ann. 446.

<sup>3</sup> *State v. Doyal*, 12 La. Ann. 653.

<sup>4</sup> *Commonwealth v. Bronson*, 14 B. Mon. (Ky.) 361.

<sup>5</sup> *Paradine v. Jaine, Aleyn*, 27; 3 Bos. & Pul. 420.

<sup>6</sup> *Bacon v. Cobb*, 45 Ill. 47; *Mill Foundry v. Hovey*, 21 Pick. 441; *Demott*

at the foundation of this rule, is, that the party must perform his contract, and if loss occurs by inevitable accident, the law will let it rest upon the party who has contracted that he will bear it.<sup>1</sup>

Where a tenant, for example, has covenanted to repair, and the buildings are destroyed by fire, or lightning, or the act of God, as it is termed, the tenant must rebuild upon the demised premises. He has contracted expressly to do it, and it is possible for him to restore that which has been destroyed, and he must do it or respond in damages.<sup>2</sup> So, in the absence of a covenant or a statute to the contrary, the lessee will be liable to pay rent after the destruction of the demised premises,<sup>3</sup> and a surety or guarantor of the payment of the rent reserved will be equally liable, and will not be excused because the premises have, by the act of God, or inevitable accident become useless to his principal.<sup>4</sup> So, if a person charters a vessel and gives a bond with a surety, conditioned for her return in a certain time, in good order, and the vessel is destroyed by the act of God, the obligors are not released from liability on the bond.<sup>5</sup> A distinction has been taken between implied contracts, or such as the law raises, and express contracts. The performance of duties implied by the law may be excused when performance becomes impossible by inevitable accident, but a duty or charge created by the express terms of an agreement may not be so excused.<sup>6</sup>

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*v. Jones*, 2 Wall, 1; *School Trustees v. Bennett*, 3 Dutch. 518; *Bullock v. Dommitt*, 6 Term, 650; *Brennock v. Pritchard*, 6 Term, 750; *Steele v. Buck*, 61 Ill. 343; S. C. 14 Am. R. 60.

<sup>1</sup> *Steele v. Buck*, 61 Ill. 343; S. C. 14 Am. R. 60.

<sup>2</sup> *Monk v. Noyes*, 1 C. & P. 265; *Beach v. Crain*, 2 N. Y. 86.

<sup>3</sup> *Hallett v. Wylie*, 3 Johns. 44; *Graves v. Berdan*, 26 N. Y. 498.

<sup>4</sup> *Kingsbury v. Westfall*, 61 N. Y. 356.

<sup>5</sup> *Steele v. Buck*, 61 Ill. 343; S. C. 14 Am. R. 60.

<sup>6</sup> *Hovey's Case*, 21 Pick. 47; *Harmony v. Bingham*, 12 N. Y. 99, 107;

To the general rule, as above stated, the courts have made certain exceptions by an equitable construction of the terms of the contract. Thus, the exception is allowed in respect to obligations taken in judicial proceedings, such as recognizances and replevin bonds.<sup>1</sup> If the principal in a recognizance die before the term at which he was bound to appear,<sup>2</sup> or after forfeiture of the recognizance, but before judgment thereon, the sureties are discharged.<sup>3</sup> And it is undoubted law, that if the condition of a bond becomes impossible to be performed by the act of God, the obligation is discharged.<sup>4</sup> It is not death alone that will excuse performance. If an action is brought on a bond given by a prisoner, with a surety, conditioned for his appearance at court at a future day, it will be a good defense, that, on that day, the principal was prevented by sickness from appearing, and has since died, or appeared as soon as he had recovered.<sup>5</sup>

Where a bond is given in replevin, conditioned for the delivery of the animal replevied, if the animal dies before judgment in the action, it will be a good defense to an action on the bond.<sup>6</sup>

It is well settled law, that upon the death of one of the makers of a joint promissory note, who was not liable for the debt irrespective of the joint obligation, but who signed the note simply as surety, his estate is dis-

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Shubrick *v.* Salmond, 3 Burr. 1637; Hadley *v.* Clarke, 8 Term, R. 259; Hand *v.* Baynes, 4 Whart. 204; Beebe *v.* Johnson, 19 Wend. 500.

<sup>1</sup> Steele *v.* Buck, 61 Ill. 343; S. C. 14 Am. R. 60. See Schwartz *v.* Saunders, 46 Ill. 22; Taintor *v.* Taylor, 36 Conn. 242; S. C. 4 Am. R. 58, 60.

<sup>2</sup> See *ante*. p. 284.

<sup>3</sup> State *v.* Cone, 32 Ga. 663.

<sup>4</sup> Scully *v.* Kirkpatrick, 79 Penn. St. 324; S. C. 21 Am. R. 62; Co. Litt. 206, a.

<sup>5</sup> Scully *v.* Kirkpatrick, 79 Penn. St. 324; S. C. 21 Am. R. 62; People *v.* Manning, 8 Cow. 296; People *v.* Tubbs, 37 N. Y. 586.

<sup>6</sup> Carpenter *v.* Stevens, 12 Wend. 589.

charged absolutely, both in law and equity;<sup>1</sup> and that it makes no difference that the death occurred after a joint judgment against the principal and surety.<sup>2</sup> The same rule applies to joint undertakings given on appeal,<sup>3</sup> or to procure a discharge from arrest.<sup>4</sup>

Where a bond is joint and several, and the obligee has elected to treat it as joint, and has recovered a joint judgment thereon against the principal and surety, and the surety afterwards dies, his estate is discharged in law and equity.<sup>5</sup> But it has also been held, that where a bond is entered into by a principal with sureties, by which the obligors jointly and severally bind themselves, their heirs, executors and administrators for the performance of the conditions of the bond, and a breach occurs, after the death of a surety therein, the estate of the deceased surety is liable.<sup>6</sup>

#### SECTION 26.—*By performance of contract.*

It is clear that when the principal has performed the act, for the performance of which he and his sureties have

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<sup>1</sup> *Risley v. Brown*, 67 N. Y. 160; *Getty v. Binnse*, 49 N. Y. 385; s. c. 10 Am. R. 379; *Wood v. Fisk*, 63 N. Y. 245; s. c. 20 Am. R. 528; *Fielden v. Lahens*, 6 Blatchf. 524; *Davis v. Van Buren*, 73 N. Y. 587. But see *Bowman v. Kistler*, 33 Penn. St. 106. This is not the rule of law in South Carolina. *Susong v. Vaiden*, 10 S. C. 247.

Where an accommodation note for the benefit of the payee, is made by one of the members of a firm in the firm name, and in this condition is negotiated to a *bona fide* holder for value, without notice, the makers do not occupy the position of sureties as to the holder; and on the death of one of the members of the firm, and the insolvency of the survivor, the note may be collected from the estate of the deceased partner. *First National Bank v. Morgan*, 73 N. Y. 593.

<sup>2</sup> *Risley v. Brown* 67 N. Y. 160; *United States v. Price*, 9 How. (U. S.) 83.

<sup>3</sup> *Wood v. Fisk*, 63 N. Y. 245; s. c. 20 Am. R. 528.

<sup>4</sup> *Davis v. Van Buren*, 72 N. Y. 587.

<sup>5</sup> *United States v. Price*, 9 How. (U. S.) 83.

<sup>6</sup> *Royal Ins. Co. v. Davies*, 40 Iowa, 469; s. c. 20 Am. R. 581.

undertaken, the liability of both is at an end, and there can be no breach upon which to base an action. So there may be cases, in which the sureties have undertaken that their principal shall perform one of two or more acts in the alternative, and in such cases the performance of either of the specified acts by the principal, discharges the surety.

Thus, where an importer, with sureties, has entered into an ordinary bond for custom duties, conditioned that within one year he will pay to the collector a specified sum, *or* the amount of duties which shall be ascertained to be due, *or*, within three years, withdraw and export the goods, or transport them to a Pacific port, the sureties will be discharged, if, within the year, the importer pays the sum specified in the bond, even though the amount so paid is less than the amount of duties subsequently ascertained to be due, as they are bound only by the condition of the bond, and the bond is discharged by the performance of one of the alternative conditions.<sup>1</sup>

If a creditor, knowing that his debtor is insolvent, accepts payment, without the consent of the surety, in fraud of the bankrupt law, the surety is discharged, although the assignee in bankruptcy afterwards recovers back the payment.<sup>2</sup> The satisfaction of a judgment affirmed in the highest appellate court, discharges the sureties upon the appeal bond.<sup>3</sup>

SECTION 27.—*By marriage between the principal and creditor.*

A marriage between the principal debtor and the creditor discharges the sureties, for the reason that it

<sup>1</sup> Dumont v. United States (U. S. Sup. Ct., decided October Term, 1878), 18 Alb. L. J. 436.

<sup>2</sup> Kentucky Northern Bank v. Cooke, 18 Bank. Reg. 306.

<sup>3</sup> Gove v. Lawrence, 6 Lans. 89.

extinguishes the right of the creditor to sue the principal.<sup>1</sup>

SECTION 28.—*Consent of surety or guarantor.*

In the foregoing discussion of the acts of the creditor prejudicial to the surety, which would have the effect of discharging the surety from liability, it has been expressly stated or assumed that the act of the creditor complained of was done without the consent of the surety.

If the surety consents to the contract for delay by which he is injured,<sup>2</sup> or to the creditor's release of securities received from the principal debtor,<sup>3</sup> or to the alteration of the principal's contract,<sup>4</sup> or to the change of the duties of the principal debtor, the surety will not be discharged.

Consent by the surety to one extension of time of payment will not extend to a subsequent extension of time of payment of the same obligation.<sup>5</sup>

But it is not necessary to prove an express consent to the extension of time in order to rebut the *prima facie* case for discharge made by the surety. This assent, like the agreement for an extension, may be implied from circumstances, such as payment of interest on the note in advance, after its maturity.<sup>6</sup>

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<sup>1</sup> Govan v. Moore, 30 Ark. 667.

<sup>2</sup> Bowling v. Flood, 1 Lea (Tenn.), 678; Remsen v. Graves, 41 N. Y. 471; Rice v. Isham, 4 Abb. App. Dec. 37; Brown v. Prophit, 53 Miss. 649; Treat v. Smith, 54 Me. 112; Adams v. Way, 32 Conn. 160; Berry v. Pullen, 69 Me. 101.

<sup>3</sup> Pence v. Gale, 20 Minn. 257. See Reddish v. Watson, 5 Ohio 510; Baldwin v. Western Reserve Bank, 5 Ohio, 273; Hunter v. Jett, 4 Rand. 104; Hollier v. Eyre, 9 Cl. & F. 1; Voiles v. Green, 43 Ind. 374.

<sup>4</sup> Gardiner v. Harback, 21 Ill. 129; Osgood v. Miller 67 Me. 174.

<sup>5</sup> Lime Rock Bank v. Mallett, 34 Me. 547.

<sup>6</sup> New Hampshire Savings Bank v. Colcord, 15 N. H. 119.

SECTION 29.—*Revival of liability after discharge.*

Where a surety is once discharged from liability, by reason of a valid contract for delay, entered into, without his knowledge or consent, between his principal and creditor, his subsequent promise to pay the debt, if made without knowledge of the extension, and without any new consideration, will not bind him or revive his liability;<sup>1</sup> nor will the receipt by him, without the knowledge of the creditor, of security against his liability, have that effect, or prevent him from setting up the fact of such extension as a defense.<sup>2</sup> But if, with full knowledge of all the facts, he makes a new promise to pay the debt, he will be discharged, notwithstanding the want of a new consideration for his promise.<sup>3</sup>

If a surety on a note is acquainted with facts which would furnish a defense to an action against him on the note, on the ground that his signature to it was obtained by false representations, and nevertheless, for the purpose of obtaining an extension of the time of payment, and in consideration thereof, promises payment, this will be a waiver of the defense, notwithstanding the surety did not know the law applicable, and which entitled him to defend.<sup>4</sup>

If a surety, after his discharge from liability in bankruptcy, makes a new promise to pay the debt, his liability will be revived.<sup>5</sup> The new promise need not be in writing,<sup>6</sup> but it must be express, unconditional, une-

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<sup>1</sup> Merrimack Co. Bank v. Brown, 12 N. H. 320; and see Montgomery v. Hamilton, 43 Ind. 451.

<sup>2</sup> Rittenhouse v. Kemp, 37 Ind. 258.

<sup>3</sup> Fowler v. Brooks, 13 N. H. 240.

<sup>4</sup> Rindskopf v. Doman, 28 Ohio St. 516.

<sup>5</sup> Marshall v. Tracy, 74 Ill. 379; Dusenberry v. Hoyt, 53 N. Y. 521.

<sup>6</sup> Henly v. Lanier, 75 N. C. 172; Kull v. Farmer, 78 N. C. 339.

quivocal,<sup>1</sup> and subsequent to the discharge,<sup>2</sup> or, if conditional, the condition must be shown to have been satisfied.<sup>3</sup> Neither payment of interest, nor part payment of principal, nor declaration of intention to pay, is sufficient.<sup>4</sup>

Under the New York Code, when the right to proceed against a surety has become barred by lapse of time, a new promise to pay the debt, or an acknowledgment of indebtedness, contained in a writing signed by the surety, is the only competent evidence of a new or continuing contract whereby to take the case out of the statute of limitations. But this provision of the Code does not alter the effect of a payment of principal or interest.<sup>5</sup> Under that statute, where a payment of interest is made upon a promissory note, by the maker, in the name of, and as the agent of, an accommodation indorser, a subsequent recognition and approval of the act by the indorser, with full knowledge of the facts, is, as regards the statute of limitations, equally binding upon him as a payment made by himself.<sup>6</sup> But the principle is recognized, in all the cases, that a payment which is to operate as an acknowledgment must be made by the debtor or his authorized agent; and there is no agency as between several joint debtors, or between principal and surety, or between an insolvent debtor and his assignees, which will make a payment by one, evidence of an acknowledgment of the debt of the others, so as to revive the demand.<sup>7</sup>

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<sup>1</sup> *Willetts v. Cothersen*, 3 Ill. App. 644; *Randidge v. Lyman*, 124 Mass. 361; *Moseley v. Coldwell*, 59 Tenn. 208; *Stern v. Nussbaum*, 3 Daly (N. Y.), 382; *Allen v. Ferguson*, 18 Wall, 1.

<sup>2</sup> *Ogden v. Redd*, 18 Bank. Reg. 317; 13 Bush. (Ky.) 581. But see *Hornthall v. McRae*, 67 N. C. 21; *Fraley v. Kelly*, 67 N. C. 78.

<sup>3</sup> *Apperson v. Stewart*, 27 Ark. 619.

<sup>4</sup> *Willetts v. Cothersen*, 3 Ill. App. 644.

<sup>5</sup> Code Civ. Pro. § 395.

<sup>6</sup> *First National Bank of Utica v. Ballou*, 49 N. Y. 155.

<sup>7</sup> *Smith v. Ryan*, 66 N. Y. 352; *Van Kenren v. Parmelee* 2 N. Y. 523; *Shoemaker v. Benedict*, 11 N. Y. 176; *Winchell v. Hicks*, 18 N. Y. 558; *Pickett v. Leonard*; 34 N. Y. 175.



## CHAPTER XIII.

### RIGHTS OF SURETIES AND GUARANTORS IN DEALINGS WITH THE CREDITOR.

SECTION 1.—Right to full disclosures respecting the risk.

- 2.—Right to a disclosure of material facts subsequent to the contract.
- 3.—Right to insist on the terms of his contract.
- 4.—Right to revoke or terminate his contract.
- 5.—Right to have the contract enforced against the principal.
- 6.—Right to compel creditor to exhaust securities.
- 7.—Rights as to the application of payments.

SECTION 1.—*Right to full disclosures respecting the risk.*

There is no proposition of law better settled than that persons proposing to become sureties for the conduct, fidelity, or contracts of another have a right to be treated with perfect good faith, and, on the proper opportunity being presented, to have all secret facts, known to the party taking the security, and materially affecting and increasing the obligation of the sureties, fully and fairly disclosed.<sup>1</sup> The law does not, however, require that the party taking the security shall seek out the sureties, and explain to them the nature and extent of their obligation, nor does it hold him responsible for the fraudulent representations of the principals, or third parties,<sup>2</sup> unless such misrepresentations are made with his knowledge and assent.<sup>3</sup>

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<sup>1</sup> Graves v. Leabanon National Bank, 10 Bush. (Ky.) 23; 19 Am. R. 50; Owen v. Homan, 3 Mac. & G., 378; 15 Jur. 339; 20 Law. J. Ch. 314.

<sup>2</sup> Western New York Life Ins. Co. v. Clinton, 66 N. Y. 326; Casoni v. Jerome, 58 N. Y. 315, 321.

<sup>3</sup> Stone v. Compton, 5 Bing, N. C. 142; 6 Scott, 846.

A surety is not, of necessity, entitled to receive, without inquiry, from the party to whom he is about to bind himself, a full disclosure of all the circumstances of the dealings between the principal and that party. If he desires to know any particular matter of which the party about to receive the security is informed, he must make it the subject of a distinct inquiry.<sup>1</sup>

It is not a consequence of the relation of principal and surety that the creditor, without any inquiry on the part of the surety, should acquaint him with every circumstance affecting the credit of the debtor, or of any matter unconnected with the transaction in which he is about to engage, which may render it hazardous.<sup>2</sup>

But there may be facts known to the creditor which good faith and fair dealing require him to disclose to the surety before the execution of the contract. The contract of suretyship imports entire good faith and confidence between the parties in regard to the whole transaction; and if a party taking a guaranty from another, conceals from him facts which go to increase his risk, and suffers him to enter into the contract under false impressions as to the real state of the facts, such concealment will amount to a fraud, because the party is bound to make the disclosure, and the omission to make it, under such circumstances, is equivalent to an affirmation that the facts do not exist.<sup>3</sup> Any concealment of material facts, or any express, or implied misrepresentation of those facts, or any undue advantage taken of the surety by the creditor, either by surprise or by withholding proper information, will undoubtedly furnish sufficient grounds to invalidate the contract.<sup>4</sup>

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<sup>1</sup> *Hamilton v. Watson*, 12 C. & F. 109; *Atlas Bank v. Brownell*, 9 R. I. 168; S. C. 11 Am. R. 231.

<sup>2</sup> *Wythes v. Labouchere*, 3 De G. and J. 593; 5 Jur. N. S. 499.

<sup>3</sup> *Story's Eq. Jur.* § 212.

<sup>4</sup> *Story's Eq. Jur.* § 324; *Franklin Bank v. Cooper*, 36 Me. 179; *Railton v. Matthews*, 10 Clark and F. 934.

If a person, having an agent already in his employment, wishes to take a bond for the future good conduct of the agent, which will be valid as against the sureties therein, he must communicate to them any past criminal misconduct of the agent in the course of his past employment.<sup>1</sup>

If a great corporation, having a belief, founded upon reasonable and reliable information, that one of its agents is a defaulter, requires of him a bond for his future fidelity, and by holding him out as a trustworthy person procure the bond with sureties, the sureties so procured will not be liable.<sup>2</sup>

In the illustrations given, it will be observed, that the information withheld or not disclosed, related in some way to the business which was the subject of the suretyship. If, however, the undisclosed information had not related to the business which was the subject of the suretyship, nor to the conduct of the agent, as agent, but to his general character—as that he was a gambler; or to his extravagant tastes, or recklessness in private business matters—as that he kept a fast horse, or speculated in stocks, this would not be a concealment of material facts, or a withholding of information which the surety had a right to have disclosed without inquiry on his part. If the sureties wish to have the obligees affected with a duty to impart such information, they should inquire for it.<sup>3</sup>

Ordinarily, the concealment which will render a contract void must amount to the suppression of facts which one party is bound in conscience and duty to disclose to the other, and in respect to which he cannot innocently

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<sup>1</sup> *Sooy v. State*, 39 N. J. Law. 135.

<sup>2</sup> *Dinsmore v. Tidball*, 34 Ohio St. 411.

<sup>3</sup> See *Atlas Bank v. Brownell*, 9 R. I. 168.

be silent.<sup>1</sup> There must be something amounting to fraud, to enable the surety to say that he is released from his contract by reason of misrepresentation or concealment,<sup>2</sup> and it has been stated that in case of a surety, concealment of facts which go to increase the risk amounts to a fraud on the surety, and that the omission to disclose, is equivalent to an affirmation that such facts do not exist. What is undue concealment from a surety will depend on the circumstances of each case. Mere non-communication of circumstances affecting the situation of the parties material for the surety to be acquainted with, and within the knowledge of the person obtaining the bond, is undue concealment, though not willful, or intentional, or with a view to any advantage to himself.<sup>3</sup> Without saying that, in every case, a creditor is bound to inquire under what circumstances his debtor has obtained the concurrence of a surety, it may be safely stated, that, if the dealings are such as fairly to lead a reasonable man to believe that fraud must have been used to obtain such concurrence, he is bound to make inquiry. In some cases, willful ignorance is not to be distinguished, in its equitable consequences, from knowledge.<sup>4</sup>

How far these matters will furnish a defense to the surety, in an action on his contract, will be considered hereafter.

## SECTION 2.—*Right to a disclosure of material facts subsequent to the contract.*

The same rule which makes it obligatory upon a party requiring a bond for the honesty and fidelity of an

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<sup>1</sup> Story's Eq. Jur. § 204.

<sup>2</sup> Pledge v. Buss, Johns. 663; 6 Jur. N. S. 695.

<sup>3</sup> Railton v. Matthews, 10 C. & F. 934.

<sup>4</sup> Owen v. Homan, 4 H. L. Cas. 997; 1 Eq. R. 370; 17 Jur. 861.

employee to disclose to the proposed sureties, before the execution of the bond, the fact of any known dishonesty of the principal in the course of his employment, makes it also obligatory upon such party to inform the sureties of any known dishonest act of the principal, subsequent to the execution of the bond by which they are rendered liable. The right of a master to dismiss a servant, on discovery of his dishonesty, is one of the remedies which a surety for the servant has a right to call upon the master to use; and if the master looses the right to discharge the servant by condoning the act of dishonesty, he throws away one of the remedies of the surety, and entitles him to his discharge.<sup>1</sup>

### SECTION 3.—*Right to insist on the terms of his contract.*

Another right which a guarantor or surety has, in respect to his contract, is that of standing upon its very terms, and of insisting that it shall not be altered, changed or varied, in any material particular, without his assent, and of claiming his discharge from all further liability under it, if such change or alteration is made; and this right is not affected by the fact that the change has not resulted in injury to him, or even that it operates to his benefit.<sup>2</sup> If another contract has been substituted for the original contract, or any alteration made in a point so material as in effect to make a new contract, without the consent of the surety or guarantor, he is discharged. He may say, "*In hoc foedere non veni*," and to charge him the case must be brought within the term of the contract, when reasonably interpreted.<sup>3</sup>

<sup>1</sup> See *Phillips v. Foxall*, L. R. 7 Q. B. 666. See Ch. 12, § 5, *ante*.

<sup>2</sup> *Miller v. Stewart*, 9 Wheat. 680; *Bangs v. Strong*, 4 N. Y. 315; *People v. Vilas*, 36 N. Y. 460; *Barns v. Barrow*, 61 N. Y. 39; *General Steam & Co. v. Rolt*, 6 C. B. (N. S.) 550; *St. Alban's Bank v. Dillon*, 30 Vt. 122.

<sup>3</sup> *Grant v. Smith*, 46 N. Y. 93; *Bacon v. Chesney*, 1 Starkie, 152; *Dobbin*

If the contract of the surety is conditional, and his liability is made to depend upon the performance of some act, or the happening of some event, he has the right to insist that he shall not be charged for the default of his principal until the condition is complied with.<sup>1</sup>

SECTION. 4.—*Right to revoke or terminate his contract.*

An agreement to guarantee obligations to be incurred may be revoked before it is acted upon, and the guarantor, in such case, may terminate his responsibility at any time, by giving notice to the other party that he will be holden no longer.<sup>2</sup> But it seems that a surety cannot, before breach, by his own act terminate a subsisting suretyship for a third person, so as to exempt himself from liability for future defaults of his principal,<sup>3</sup> although after a breach, which will justify a termination of the contract, the surety has a right to require that the contract with the principal be terminated, and the claim against the surety confined to the damage then recoverable.<sup>4</sup>

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*v. Bradley*, 17 Wend. 422; *Walrath v. Thompson*, 6 Hill 540; S. C. 2 N. Y. 185; *Wharton v. Hall*, 5 Barn. & Cress. 269.

<sup>1</sup> *Clay v. Edgerton*, 19 Ohio St. 549; S. C. 2 Am. R. 422; *Talmadge v. Williams*, 27 La. Ann. R. 653; *Linn County v. Farris*, 52 Mo. 75; S. C. 14 Am. R. 389; *Whitsell v. Mebane*, 64 N. C. 345.

<sup>2</sup> *Agawam Bank v. Strever*, 18 N. Y. 502; *Offord v. Davies*, 31 L. R. C. B. 319; 12 C. B. (N. S.) 748; *Jordan v. Dobbins*, 122 Mass. 168.

<sup>3</sup> *Hough v. Warr*, 1 Car. & P. 151; *Calvert v. Gordon*, 1 M. & Ry. 497; S. C. 7 B. & C. 809; *Gordon v. Calvert*, 2 Sim. 253; S. C. 4 Russ. 581; *Calvert v. Gordon*, 3 M. & Ry. 124.

<sup>4</sup> *Hunt v. Roberts*, 45 N. Y. 691; *McKecknie v. Ward*, 58 N. Y. 541, 551.

A continuing guaranty by a firm, may be revoked by a dissolution of the co-partnership and notice of dissolution given to the creditor. The effect of such dissolution and notice is to absolve the guarantors from liability for advances made after the notice is given, unless something occurs to qualify or destroy the effect of such notice. *City Nat. Bank v. Phelps*, 16 Hun, 158. An executor is not liable for advances made after his testator's death, as this operates as a revocation, especially if the person making the advances had

If a person has given a continuous guaranty for the honesty of a servant, the guarantor cannot ordinarily, during the continuance of the service, discharge himself, either at law or in equity, by merely giving notice that he will no longer be liable.<sup>1</sup> But it seems that, when the guarantor discovers the dishonesty of a servant whose fidelity he has guaranteed, he may withdraw his guaranty, and in case the employer refuses to give the guaranty up, the guarantor may file a bill in equity to compel the delivery and cancellation of his bond.<sup>2</sup>

When an executor has once given a bond under an order of the Orphan's Court, and an application has been made charging him with mismanagement of the funds, the legatees acquire a vested interest in the bond to the same extent as if it had been given directly to them; and the court has no power, by subsequent order, to release the bond, or substitute another in its stead, without the consent of the legatees.<sup>3</sup> Ordinarily, the court will not discharge original sureties to an administrator's bond, or allow other sureties substituted.<sup>4</sup> By the statutes of some of the States, however, whenever the surety of an administrator conceives himself in danger of being injured by his suretyship, he is entitled to be relieved from future liability

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received notice of the death before making the advances. See *Harris v. Fawcett*, L. R. 8 Ch. App. 866. Starkie says, that it has been decided that a continuing guaranty is countermandable by parol, 2 Stark. Ev. (2 Eu.) 371, n.

Where a bond is given for the performance of mercantile engagements to be incurred from time to time, and is silent as to the time during which the surety therein shall be responsible, the surety may terminate his liability for future transactions by notifying the obligee that he withdraws, subject, however, to any rights which the obligee has already acquired. *Jeuderine v. Rose*, 36 Mich. 54. See *Gelpcke v. Quentell*, 74 N. Y. 599.

<sup>1</sup> *Calvert v. Gordon*, 3 M. & N. 124; *Gordon v. Calvert*, 4 Russ. 581; *Hassall v. Long*, 2 M. & S. 363, 370.

<sup>2</sup> *Burgess v. Eve*, 13 L. R. Eq. 457, 458. See *Phillips v. Foxall*, 20 W. R. (Q. B.) 907.

<sup>3</sup> *Commonwealth v. Rogers*, 53 Penn. St. 470.

<sup>4</sup> In the goods of Stock, L. R. 1 P. & D. 76.

on his own motion, without proof of any danger.<sup>1</sup> But the surety cannot have any relief that will impair the right of the parties interested in the estate.<sup>2</sup>

SECTION 5.—*Right to have the contract enforced against the principal.*

In Iowa, Indiana, Kentucky, Arkansas, Mississippi and other western and southern States, a surety may, by a notice given to the creditor, require him to proceed to collect his demand, or to permit the surety to do so in the name of the creditor; or, in default of such action, to forego all further claim against the surety under his contract.<sup>3</sup> The form, sufficiency and effect of this notice has been considered in another chapter.

So, in New York and other States, a surety, while his

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<sup>1</sup> McKay v. Donald, 8 Rich. (S. C.) 331.

<sup>2</sup> Owens v. Walker, 2 Strobb. Eq. 289; M'Mekin v. Huson, 3 Strobb. 327; Polk v. Wisener, 2 Humph. 520; Shelton v. Cureton, 3 M'Cord, 412.

By Chapter 18 of the New York Code of Civil Procedure, relating to executors, administrators, guardians and testamentary trustees it is provided as follows:

§ 2600. Any or all of the sureties in a bond, taken as prescribed in this chapter, may present a petition to the Surrogate's Court, praying to be released from responsibility, on account of any future breach of the condition of the bond; and that the principal in the bond may be cited to show cause, why he should not give new sureties. The surrogate must thereupon issue a citation accordingly.

§ 2601. Upon the return of a citation, issued as prescribed in the last section, if the principal in the bond files in the surrogate's office a bond in the usual form, with new sureties to the satisfaction of the surrogate, then, or within such a reasonable time, not exceeding five days, as the surrogate fixes, the surrogate must make a decree, releasing the petitioner from liability upon the bond for any subsequent act or default of the principal; otherwise, he must make a decree, revoking the delinquent's letters.

<sup>3</sup> See Reid v. Cox, 5 Blackf. 312; Nichols v. McDowell, 14 B. Mon. 6; Thornburgh v. Madren, 33 Iowa, 380; Cummings v. Garretson, 15 Ark. 182; Kaufman v. Wilson, 29 Ind. 504; Harriman v. Egbert, 36 Iowa, 270; Lockridge v. Upton, 24 Mo. 184; Bates v. State Bank, 2 Eng. 394; Towns v. Riddle, 2 Ala. 694.



principal is solvent, may give notice to the creditor to proceed to enforce the contract and collect his demand of the principal, and may claim his discharge if the creditor neglects to comply with the notice until the principal becomes insolvent.<sup>1</sup> The surety is discharged in such case, because it is the duty of the creditor to obtain payment in the first instance of the principal debtor and not of him who is surety; it is right that the principal should pay the debt; it is inequitable and unjust for the creditor, by delaying to sue, to expose the surety to the hazard arising from a prolongation of the credit; and the creditor is under an equitable obligation to obtain payment from the principal, and not from the surety, unless the principal is unable to pay.

But when the contract is one of guaranty, entered into for the benefit of the guarantor subsequent to the original transaction, and upon a new and independent consideration, as for example, where an existing debt or security is transferred for value, and guaranteed, this equity does not attach, and the guarantor cannot, by notice, impose upon the creditor the duty of active diligence at the risk of discharging the guarantor by its omission.<sup>2</sup>

A surety, upon the debt becoming due, may go into equity to compel the principal to pay and the creditor to receive payment, and he may also, in equity, compel the creditor to proceed against the principal debtor for the collection of his demand, upon giving security and indemnifying the creditor against delay and expenses.<sup>3</sup>

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<sup>1</sup> *Colgrove v. Tallman*, 67 N. Y. 95; *Remsen v. Beekman*, 25 N. Y. 552. See *ante*, p. 224.

<sup>2</sup> *Wells v. Mann*, 45 N. Y. 327.

<sup>3</sup> *Thompon v. Taylor*, 72 N. Y. 32; *King v. Baldwin*, 2 Johns. Ch. 554; *Hays v. Ward*, 4 Johns. Ch. 123; *Croome v. Birens*, 2 Head (Tenn.), 339; *Gilliam v. Esselman*, 5 Sneed, 86; *Huey v. Pinney*, 5 Minn. 310. A creditor

But it is held that the surety can require the creditor to proceed first against the principal only when his suretyship appears on the face of the instrument, or when he offers to indemnify the creditor in his proceedings against the principal and to pay whatever the principal fails to pay.<sup>1</sup> There are cases, however, in which the fact of the suretyship does not appear on the face of the instrument, and yet the creditor is chargeable with knowledge of the relation, as for example, where the real estate of the wife is mortgaged to secure the debt of the husband, and her title is on record.<sup>2</sup> And where the husband and wife join in a mortgage of her lands to secure his debt, if it be shown that the debt was his, and that the mortgage was given to secure it, this establishes the fact that the wife was surety.<sup>3</sup>

The right of the surety to have the debt of his principal satisfied out of the property of the principal, does not depend upon the existence of the relation of principal and surety between his debtors at the time the debt was contracted, nor upon his consent to the subsequent creation of such relation. There are many instances in the reports, wherein the action of third parties, among themselves, has changed the relations of the creditor to them, without his assent thereto, and has created equities in favor of all or one of them, which he was bound to regard, and to refrain from injuring by his action or omis-

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is under an equitable obligation to obtain judgment from the principal debtor, if he is able, though this doctrine is not recognized at law. *Huey v. Pinney*, 5 Minn. 310.

Under the statutes of Minnesota (Comp. St. 620, § 25), the surety, having the power to maintain an action against the principal to compel him to satisfy the indebtedness, must resort to this remedy instead of compelling the holder of the debt to bring the suit. *Id.*

<sup>1</sup> *In re Babcock*, 3 Story, 393.

<sup>2</sup> *Bank of Albion v. Burns*, 46 N. Y. 170.

<sup>3</sup> *Vartie v. Underwood*, 18 Barb. 561.

sion. Thus, if the equity of redemption of mortgaged premises is sold on execution by a judgment creditor of the mortgagor, and then the mortgagor having also a bond for his debts, seeks to enforce it out of property of the mortgagor other than the lands mortgaged, he will either be stayed or forced to make over the debt and security to the mortgagor, so that he may save himself out of the premises.<sup>1</sup> So, too, if a mortgagor conveys part of the mortgaged premises, subject to the whole mortgage, the part sold is first liable for the whole debt, or, in other words, becomes the principal debtor, and the mortgagee must exhaust it before he can seek other property of the mortgagor, who has become in equity the surety.<sup>2</sup>

So, where one of two partners purchases the interest of the other in the partnership property, and assumes the partnership debts, the purchaser becomes in equity the principal debtor, and the vendor a surety, and a firm creditor having notice of the facts is bound to observe the relation.<sup>3</sup> These rights, arising out of the principles of suretyship, where the relation of principal and surety has not been created by an express ordinary contract of suretyship, will be considered in a subsequent chapter.

As has been shown, a guarantor of the collection of a demand has a right to insist that the creditor shall exhaust all his available legal remedies against the principal debtor before resorting to him, unless, as is held in many of the States, the principal is so clearly insolvent that such remedies would be of no avail.<sup>4</sup>

Except in the cases specified, a creditor cannot be

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<sup>1</sup> *Tice v. Annin*, 2 Johns. Ch. 125, 128; *Ferris v. Crawford*, 2 Denio, 595.

<sup>2</sup> *Halsey v. Reed*, 9 Paige, 446.

<sup>3</sup> *Colgrove v. Tallman*, 67 N. Y. 95; *Millard v. Thorn*, 56 N. Y. 402. See *ante*, p. 40.

<sup>4</sup> See *ante*, p. 139.

compelled to exhaust his remedy against the principal debtor before he resorts to the surety, unless there are peculiar circumstances rendering the interference of a court of equity proper.<sup>1</sup> Ordinarily, as will be shown hereafter, a resort to a court of equity to compel payment by the principal will be unnecessary, as the surety can pay the creditor's claim in discharge of his liability as soon as there is default on the part of the principal, and be thereupon subrogated to all the rights and remedies of the creditor, or may pay and then proceed against his principal on the implied contract of indemnity. But if the creditor is delaying the collection of his demand, and the surety has reason to apprehend danger from the delay, he may compel the creditor to proceed against the principal debtor.<sup>2</sup>

A surety has no right to require that, in a suit pending against him and his principal, proceedings against him shall be stayed until the property of the principal has been discussed. The most that he can ask in such case is, that, after complying with certain requirements of law, the property of the principal shall be discussed, under execution before recourse on his property is had.<sup>3</sup> A surety, bound in a joint and several contract with his principal, may be proceeded against in the first instance, and the amount of the principal's indebtedness ascertained in the action against the surety;<sup>4</sup> or the creditor may proceed against both the principal debtor and his surety for the satisfaction of the debt.<sup>5</sup> The equitable

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<sup>1</sup> *Abercrombie v. Knox*, 3 Ala. 728.

<sup>2</sup> *Hayes v. Ward*, 4 Johns. Ch. 123.

<sup>3</sup> *Hill v. Bourcier*, 29 La. Ann. 841. See *Watson v. Sutherland*, 1 Tenn. Ch. 208; *Stinson v. Hill*, 21 La. Ann. 560.

<sup>4</sup> *Domestic Sewing Machine Co. v. Saylor*, 86 Penn. St. 287. A surety of a lessee cannot compel the lessor to proceed against his principal by distress warrant. *Brooks v. Carter*, 36 Ala. 682.

<sup>5</sup> *Muscatine v. Mississippi, &c. R. R. Co.*, 1 Dill. 536; *Garey v. Hignutt*, 32 Md. 552; *Fuller v. Loring*, 42 Me. 481.

rights of the surety are not that he shall be released from his contract liabilities, but that the creditor shall not, by delay in the enforcement of his rights, prejudice the rights of the surety as against his principal, or render them of no avail. To prevent such results he may resort to the legal and equitable remedies hereinbefore pointed out.

SECTION 6.—*Right to compel creditor to exhaust securities.*

Where the holder of a note has in his hands funds of one of the makers, who is a principal debtor, a surety in such note is entitled to have the holder exhaust the fund in discharge of the note, before resorting to him as surety.<sup>1</sup> But the right to compel a creditor to resort to a collateral security in the first instance does not exist in all cases, and cannot be insisted upon unless such security would be as available in all respects as a proceeding against the surety.<sup>2</sup>

A judgment plaintiff is not required to pursue collateral remedies before resorting to the sureties' property. Thus, where a sheriff has levied an execution on the property of the principal, and has taken from him a delivery bond with a surety, which is afterwards forfeited by non-delivery, and the principal has no other property, a levy on the property of the judgment surety is proper, without a prior resort to the surety on the delivery bond.<sup>3</sup>

Where a judgment has been obtained against the principal and surety, the principal being insolvent, the surety, before payment, may file a bill to compel the discharge of the debt out of the estate of the principal in

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<sup>1</sup> Wright v. Austin, 56 Barb. 13. See Matthews v. Aiken, 1 N. Y. 595; Soule v. Ludlow, 6 N. Y. Sup. Ct. (T. & C.) 24; Gary v. Cannon, 3 Ired. Eq. 64, 65.

<sup>2</sup> Gary v. Cannon, 3 Ired. Eq. 64.

<sup>3</sup> Brown v. Brown, 17 Ind. 475.

the hands of third persons.<sup>1</sup> So, too, the surety may compel the creditor to prove his debt against the principal before the commissioner in bankruptcy, before he calls upon the surety for payment.<sup>2</sup> And where the surety has pledged his property with the property of the principal, he has the right to have the property of the principal first sold and applied; and if the property of both principal and surety has been sold, the same principle applies and governs in directing payments. The property or money of the principal is the primary fund, and must be first exhausted.<sup>3</sup>

SECTION 7.—*Rights as to the application of payments.*

The general doctrine as to application of payments made by the principal debtor will be considered elsewhere. The general principle is undisputed, that the debtor making a payment has the right to direct how the payment shall be applied. If he fails to exercise that right, the creditor may make the application; and if neither party make any specific application of the payment, the court will make it for them, according to the circumstances of the case.

It is frequently claimed that a surety for a debt has a right to control the application of a general payment by his principal; and that where the parties have failed to make an application of a payment, that the courts should apply it to the discharge of the obligation of the surety. A debtor has a right to control his own means of payment; to apply these means to the payment of any debt he chooses; and cannot be controlled in such application by

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<sup>1</sup> *McConnell v. Scott*, 15 Ohio, 401.

<sup>2</sup> See *Wright v. Austin*, 56 Barb. 13, 17; *Ex parte Rushford*, 10 Ves. Jr. 409; *In re Babcock*, 3 Story, 393.

<sup>3</sup> *Vartie v. Underwood*, 18 Barb. 561.

his sureties.<sup>1</sup> The mere fact that there is a surety for one of several debts, due from the principal to the creditor, will not preclude the creditor from applying a general payment of his debtor to a debt for which he has no security.<sup>2</sup> If the money has been raised by the debtor by the aid of the indorsement of the surety, given for the express purpose of enabling the debtor to raise funds to pay the secured debt, and these facts are communicated to the creditor, he will not be permitted, even with the consent of the debtor, to misapply it ;<sup>3</sup> but if the debtor brings the money, thus raised, to the creditor, and pays it to him expressly upon the unsecured debt, without disclosing the means by which the money had been raised, or any agreement as to its use, the payment is valid. The same result follows when the debtor, by omitting to specify on which debt the payment is to be credited, authorizes the creditor to apply it to either, and the creditor exercises this option.<sup>4</sup> The money belongs to the debtor, and when the creditor is ignorant of any duty on the part of the debtor in respect to it, he may receive and apply it as if no such duty existed. But where no application has been made by either party, and the duty is cast upon the court of making the proper application, the equities of the surety will doubtless be considered.<sup>5</sup> Where a person has guaranteed the purchase price of goods, and the purchases have been charged to the general account of the purchaser, a payment on account generally, sufficient to discharge the purchasers guaranteed, and those prior thereto, will be considered as cancelling the debt

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<sup>1</sup> *Robson v. McKoin*, 18 La. Ann. 544.

<sup>2</sup> *Harding v. Tift*, 75 N. Y. 461; *Allen v. Culver*, 3 Denio, 285; *Stone v. Seymour*, 15 Wend. 20; *Hansen v. Rounsavell*, 74 Ill. 238.

<sup>3</sup> *Harding v. Tift*, 74 N. Y. 461.

<sup>4</sup> *Harding v. Tift*, 74 N. Y. 461.

<sup>5</sup> *Harding v. Tift*, 75 N. Y. 461.

guaranteed, if no other application of the payment has been made by the parties before suit.<sup>1</sup>

If money is paid, with directions that it be applied on a debt covered by a guaranty, the creditor cannot apply it elsewhere.<sup>2</sup>

When a payment has once been applied upon a note, executed by a principal and surety, it cannot, by an agreement between the maker and holder, be afterwards diverted from that application to another debt, so as to revive the obligation of the surety.<sup>3</sup> And where an application has been made by a creditor to an unsecured debt, in accordance with his apparent legal right, and in ignorance of any fact which should prevent him from making such application, he is not bound to change it on the subsequent disclosure that a surety had an interest in having it otherwise applied, and that the debtor had violated a duty to the surety in not directing such application.<sup>4</sup> The holder of different notes, secured by a deed of trust, may apply the entire proceeds of a sale, under the deed, to those last maturing, and cannot be prevented, either in law or equity, from recovering judgment against a surety on an earlier note by reason of such application.<sup>5</sup> So, where a creditor collects by action, part of a demand on which a surety is liable, he is entitled, as against the surety, to apply the money first to the payment of the costs, leaving the remainder only to be applied in reduction of the debt.<sup>6</sup>

Where several official bonds have been executed by a collector of public revenue, at different times, with dis-

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<sup>1</sup> *Pierce v. Knight*, 31 Vt. 701; *Berghaus v. Alter*, 9 Watts, 386.

<sup>2</sup> *Wetherell v. Joy*, 40 Me. 325.

<sup>3</sup> *Miller v. Montgomery*, 31 Ill. 350.

<sup>4</sup> *Harding v. Tift*, 75 N. Y. 461.

<sup>5</sup> *Matthews v. Switzler*, 46 Mo. 301.

<sup>6</sup> *Mosher v. Hotchkiss*, 3 Abb. App. Dec. 326.



tinct sets of sureties, money collected under a subsequent bond will not be applied in payment of a prior one, where the parties have failed to make the application; but a court of equity will so appropriate the payments as to give each bond credit for the money due and collected under it.<sup>1</sup> A general payment, made by a public officer who has given security, may be applied to a preceding defalcation; but if a new bond, with new sureties, be given, each set of sureties is entitled to credit for payments made during their respective suretyships, if no appropriation is made by the parties.<sup>2</sup> If a collector of revenue, for two successive terms, with two sets of sureties, appropriates funds collected during his second term to the discharge of a deficit in the account of his first term, the payment cannot be disturbed if the party receiving it acted in good faith. And the rule is the same if the party receiving it makes such application in good faith.<sup>3</sup>

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<sup>1</sup> *Pickering v. Day*, 2 Del. Ch. 333.

<sup>2</sup> *Seymour v. Van Slyck*, 8 Wend. 403; S. C. 15 Wend. 19.

<sup>3</sup> *State v. Smith*, 26 Mo. 226.

## CHAPTER XIV.

### RIGHTS OF CO-SURETIES AS BETWEEN THEMSELVES, OTHER THAN THE RIGHT OF CONTRIBUTION.

SECTION I.—Who are co-sureties.

- 2.—Rights of a surety in securities held by a co-surety.
- 3.—Right to set aside fraudulent conveyances by co-surety.
- 4.—Right to indemnify under a promise express or implied.
- 5.—Protection of rights of co-sureties by injunction.
- 6.—Bills *quia timet*.

SECTION I.—*Who are co-sureties.*

In determining the rights of sureties among themselves, the question whether they occupy the relation of co-sureties is often of great importance. Nothing is clearer than that several persons may be bound for the same principal, by the same instrument; and while each may be liable to the obligee or creditor for the principal's default, may not occupy as to the others the relation of co-surety. So, parties may be bound for the same debt or default of the principal by different instruments, and yet occupy as to each other the relation of co-sureties. In determining the question of co-suretyship, the courts look rather at the substance than at the form of the obligations of the parties, and to the engagements they have entered into, rather than to the instruments by which their engagements are evidenced. If several persons, or sets of persons, enter into contracts of suretyship which are the same in their legal obligation and character, though by different instruments, at different times, without the knowledge of each other, they are co-sureties, and liable to each other as such.

A co-surety undertakes, with another, to be responsible

for the debt or duty of a third person. Their obligation, though several, is not collateral, but is for the same thing. A guarantor of a note, and a surety for the same obligation, are not co-sureties;<sup>1</sup> and a supplemental surety for all the prior parties, including the principal as well as the sureties, is not a co-surety with the other sureties.<sup>2</sup> If a person becomes surety for the payment of money by another, who is himself a surety for a third person, they are not co-sureties.<sup>3</sup> The elements of co-suretyship are: a common creditor, a common debtor, a common debt, and a written undertaking by the sureties to pay that debt, either by the same or different instruments.<sup>4</sup>

SECTION 2.—*Rights of a surety in securities held by a co-surety.*

A surety who receives from his principal a mortgage or other security for his indemnity against a particular debt, is regarded as a trustee for his co-sureties, and held to the exercise of the duties which attach to that relation.<sup>5</sup> The security held by him enures to the benefit of his co-sureties,<sup>6</sup> and he cannot apply the property or security so held, or the proceeds of the same, to any other

<sup>1</sup> Hamilton v. Johnson, 82 Ill. 39.

<sup>2</sup> Monson v. Drakeley, 40 Conn. 552.

<sup>3</sup> Remington v. Staats, 1 Sup. Ct. R. (T. & C.) 394. See Robertson v. Neatherage, 82 Ill. 511.

<sup>4</sup> Norton v. Coons, 6 N. Y. 33.

<sup>5</sup> Taylor v. Morrison, 26 Ala. 728; Hall v. Robinson, 8 Ired. 56; Carpenter v. Kelly, 9 Hun, 106.

<sup>6</sup> Steele v. Mealing, 24 Ala. 285; Fagan v. Jaycocks, 4 Dev. 63; Low v. Smart, 5 N. H. 358; Bachelder v. Fisk, 17 Mass. 464; Elwood v. Diefendorf, 5 Barb. 398; Brown v. Ray, 18 N. H. 102; Siebert v. Thompson, 8 Kansas, 65; McCune v. Belt, 45 Mo. 174; Aldriche's Ex'rs v. Hopgood, 39 Vt. 617; Smith v. Conrad, 15 La. Ann. 594; Miller v. Sawyer, 30 Vt. 412; Paulin v. Kaighn, 3 Dutch. (N. J.) 503; Agnew v. Bell, 4 Watts, 31; McMahon v. Fawcetts, 2 Rand. 514; Gregory v. Murrell, 2 Ired. Ch. 233.

debt, to the prejudice of his co-surety,<sup>1</sup> nor can he surrender or abandon the security, without forfeiting his right to contribution<sup>2</sup> to the extent at least of the security.

The surety receiving the indemnity must neither do any act by which the security may be depreciated or lost, nor omit to do any act which will prevent such result; but must faithfully appropriate the security to the payment of the debt, or be chargeable with the loss arising from his misfeasance or nonfeasance, on the final adjustment among the co-sureties of their respective proportions of the debt.<sup>3</sup>

If the principal debtor is in failing circumstances, and one surety receives property from him, which he gives his co-surety to understand is security for their joint liability, and the latter relies upon the assurance, the former will be responsible for the same to his co-surety, and is not at liberty, even with the consent of the principal, to apply it to a separate liability.<sup>4</sup>

As a general rule, a surety who, by any means, gets a fund belonging to the principal, is not at liberty to take the entire benefit of it, but must share it with his co-surety.<sup>5</sup> But if a surety, for a consideration paid by him, obtains indemnity, his co-surety cannot claim the benefit of the indemnity without paying his proportion of the consideration;<sup>6</sup> and if there are several demands upon which he is surety, with different co-sureties, and he has taken security generally for his indemnity, it will

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<sup>1</sup> *Steele v. Mealing*, 24 Ala. 285.

<sup>2</sup> *Taylor v. Morrison*, 26 Ala. 728; *Ramsey v. Lewis*, 30 Barb. 403; *Paulin v. Kaighn*, 5 Dutch. (N. J.) 480.

<sup>3</sup> *Schmidt v. Coulter*, 6 Minn. 492.

<sup>4</sup> *Hinsdill v. Murray*, 6 Vt. 136.

<sup>5</sup> *Leary v. Cheshire*, 3 Jones Eq. (N. C.) 170.

<sup>6</sup> *White v. Banks*, 21 Ala. 705.

be apportioned among all the demands *pro rata*;<sup>1</sup> and if he is a creditor as well as surety, and the security is taken to indemnify him in both capacities, he is entitled to appropriate so much of it as will satisfy his debt in full.<sup>2</sup> But, in the absence of an agreement to that effect entered into at the time of taking the security, he cannot hold it to indemnify himself against demands against his principal subsequently purchased by him.<sup>3</sup> And if the liability of the sureties has been adjusted and discharged, by each paying his portion of the principal's debt, one of the sureties will not be entitled to the benefit of a mortgage subsequently given to secure the other.<sup>4</sup>

Where a surety gives collateral security for the payment of his principal's debt, a co-surety who has paid the debt does not become entitled to that security.<sup>5</sup>

If one of several co-sureties subsequently takes a security from the principal for his own indemnity, it enures to the benefit of all the sureties so far as they are co-sureties. But so far as he has a security for individual claims which he has against the same person, he is entitled to hold it.<sup>6</sup>

### SECTION 3.—*Right to set aside fraudulent conveyances by co-surety.*

Where two of three sureties in a bond, after judgment and execution against all the sureties, pay the judgment in full, but retain the levy against the co-surety for their benefit, they may join in a bill in aid of the execution to remove conveyances made by such co-

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<sup>1</sup> *Brown v. Ray*, 18 N. H. 102; *Goodloe v. Clay*, 6 B. Mon. 236.

<sup>2</sup> *Brown v. Ray*, 18 N. H. 102.

<sup>3</sup> *Brown v. Ray*, 18 N. H. 102.

<sup>4</sup> *Hall v. Cushman*, 16 N. H. 462; *Allen v. Wood*, 3 Ired. Ch. 386.

<sup>5</sup> *Bowdich v. Green*, 3 Metc. 360.

<sup>6</sup> *McCune v. Belt*, 45 Mo. 174.

surety in fraud of such execution levy, to the end that it may be made available to them by way of subrogation to enforce a contribution.<sup>1</sup> Where a joint surety has satisfied a joint judgment against himself and his co-surety, an execution issued against such co-surety upon the joint judgment, is a good ground for a bill to reach his equitable property.<sup>2</sup>

Generally speaking, where the principal debtor has made a conveyance of property fraudulent as to the creditor, a surety, on paying the debt, is subrogated to the rights and remedies of the creditor, and may maintain an action to set aside the conveyance.<sup>3</sup>

SECTION 4.—*Right to indemnity under a promise express or implied.*

An agreement, under seal, to equalize any losses that should be incurred, by two persons jointly liable as sureties for another, gives a right of action which may be enforced at law.<sup>4</sup>

A surety who has entered into the contract of suretyship, at the request of a co-surety and on his promise of indemnity, may recover from his promisor all that he has been compelled to pay by reason of entering into the contract,<sup>5</sup> even though the promise has not been reduced to writing.<sup>6</sup> There need be no express promise of indemnity to give the surety this right of action, as the law implies a promise of indemnity to a surety who

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<sup>1</sup> Smith v. Rumsey, 33 Mich. 183.

<sup>2</sup> Cuyler v. Ensworth, 6 Paige, 32.

<sup>3</sup> Martin v. Walker, 12 Hun, 46.

<sup>4</sup> Patterson v. Patterson, 23 Penn. St. 464.

<sup>5</sup> Apgar v. Hiler, 4 Zab. (N. J.) 812.

<sup>6</sup> Apgar v. Hiler, 4 Zab. 812; Thomas v. Cook, 3 M. & R. 444; 8 B. & C. 728; Farrell v. Maxwell, 28 Ohio St. 383; s. c. 22 Am. R. 393; Horn v. Bray, 51 Ind. 555; 19 Am. R. 742; Barry v. Ransom, 12 N. Y. 462.

has signed the principal obligation at the request of his co-surety.<sup>1</sup>

The measure of damages for a breach of this contract, or the amount recoverable in an action on the express or implied contract, is the same as on contracts of similar character entered into between principal and surety.

SECTION 5.—*Protection of rights of co-sureties by injunction.*

Courts of equity do not limit their interference in cases of suretyship to the mere enforcement of the right of contribution or subrogation, but exercise their jurisdiction to prevent any act which will tend to defeat or impair these rights, and to restrain their abuse.

If the principal debtor is insolvent, and one of two or more mere sureties is about to make such disposition of his property as to throw the burden of the debt upon the co-surety, a court of equity will, on the application of the latter, restrain such disposition, or relieve against it if made.<sup>2</sup>

So, where one of the sureties in a note has received indemnity from his principal, and assumed to pay the note, and has paid it in part, but has subsequently procured a third person to purchase it for his benefit, and the assignee has recovered a judgment thereon against his assignor and a co-surety, and has levied his execution on the property of the latter, a court of equity will restrain its collection.<sup>3</sup>

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<sup>1</sup> Barry v. Ransom, 12 N. Y. 462; Konitzky v. Meyer, 49 N. Y. 571. When the maker of a promissory note procures a person to guarantee the same after others, who are, in fact, sureties, have signed it, and without their knowledge, the sureties will be liable to the guarantor on his being compelled to pay the note, they being all primarily liable, and the request of one being the request of all. Hamilton v. Johnson, 82 Ill. 39.

<sup>2</sup> Bowen v. Hoskins, 45 Miss. 183; S. C. 7 Am. R. 728.

<sup>3</sup> Silvey v. Dowell, 53 Ill. 260.

So, if a surety has paid a judgment against his principal, and taken an assignment of it, a court of equity will restrain the surety from enforcing the judgment, except as to the portion of the debt due from his co-sureties.<sup>1</sup> A surety of an administrator may maintain a bill in equity to declare void a judgment illegally rendered against the administrator, and to enjoin further proceedings thereon.<sup>2</sup>

SECTION 6.—*Bills quia timet.*

Upon the principle of *quia timet*, a surety may file a bill against a counter-security to enforce his exoneration, though he may be insolvent.<sup>3</sup>

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<sup>1</sup> *McDaniels v. Lee*, 37 Mo. 204.

<sup>2</sup> *Washington v. Barnes*, 41 Ga. 307.

<sup>3</sup> *Ferrer v. Barrett*, 4 Jones Eq. (N. C.) 455.



## CHAPTER XV.

### RIGHT OF CONTRIBUTION.

- SECTION 1.—Nature and origin of the right.
- 2.—Between persons bound by different instruments, &c.
  - 3.—Where the undertaking is not joint but separate and successive.
  - 4.—Where the sureties are bound for the same principal, but not for the same debt or thing.
  - 5.—Between accommodation indorsers.
  - 6.—When the right accrues.
  - 7.—Voluntary payments.
  - 8.—Contracts of suretyship entered into by request of co-surety, etc.
  - 9.—Effect of indemnity given to co-surety.
  - 10.—Prior proceedings against the principal as a condition precedent.
  - 11.—How death of co-surety affects the right.
  - 12.—Statute of limitations as a bar.
  - 13.—Effect of a discharge in bankruptcy.
  - 14.—Extent of the right.
  - 15.—Where some of the co-sureties are absent or insolvent.

#### SECTION 1.—*Nature and origin of the right.*

The right of contribution is an equity which springs up at the time two or more persons assume as to each other the relation of co-sureties for a common principal, and ripens into a cause of action when one of the sureties pays more than his proportion of the debt for which all were liable.<sup>1</sup>

The doctrine of contribution was first established and enforced in equity, and was based upon and resulted from the maxim "Equality is equity."<sup>2</sup> The equity springs out of the proposition that when two or more sureties stand in the same relation to the principal, they are equal-

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<sup>1</sup> *Camp v. Bostwick*, 20 Ohio St. 337; 5 Am. R. 669; *Wayland v. Tucker*, 4 Gratt. (Va.) 267; *Sargent v. Salmond*, 27 Me. 539.

<sup>2</sup> *Norton v. Coons*, 6 N. Y. 33; *Wells v. Miller*, 66 N. Y. 255.

ly entitled to all the benefits, and must bear equally all the burdens of the position.<sup>1</sup> This principle of equity has been so long established and so uniformly applied to contracts of suretyship, that persons bound as sureties for a principal debtor, are regarded as acting under a contract implied from the settled rules of equity which regulate their liability to each other.<sup>2</sup> From the fact that two or more persons have assumed the relation of co-sureties, the common law implies a promise from each to the other to contribute in case of unequal payment.<sup>3</sup> For a long time courts of equity exercised exclusive jurisdiction in cases of contribution, but in course of time courts of common law assumed jurisdiction, based upon the idea that the equitable principle had been so long and so generally acknowledged and enforced, that persons in placing themselves under circumstances to which the equitable principle applied, might well be supposed to act under a contract implied from the universality of that principle.<sup>4</sup>

But equity does not resort to the fiction of an implied contract. It equalizes burdens, and enforces the reasonable expectations of the co-sureties, that all shall contribute equally towards the payment of the common debt, because it is just and right in good morals, and not because of any supposed promise between them.<sup>5</sup> It is upon these equitable principles that the right of contribution depends rather than upon contract; and, indeed, the right exists even where the sureties are ignorant of each other's engagement and could not have contracted

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<sup>1</sup> *Wells v. Miller*, 66 N. Y. 255.

<sup>2</sup> *Norton v. Coons*, 6 N. Y. 33; *Graythorne v. Swinburne*, 14 Ves. 169; *Agnew v. Bell*, 4 Watts (Penn.), 31.

<sup>3</sup> *Camp v. Bostwick*, 20 Ohio St. 337; S. C. 5 Am. R. 669.

<sup>4</sup> *Lansdale v. Cox*, 7 T. B. Mon. (Ky.) 401; *Norton v. Coons*, 6 N. Y. 33.

<sup>5</sup> *Camp v. Bostwick*, 20 Ohio St. 337; *Armitage v. Pulver*, 37 N. Y. 494; *Deering v. Earl of Winchelsea*, 2 Boss. & Pul. 273; *Tyus v. De Jarnett*, 26 Ala. 280.

with reference thereto.<sup>1</sup> Nor is the right founded upon the contract of suretyship,<sup>2</sup> or in any way dependent upon the doctrine of subrogation.<sup>3</sup> The tendency of the courts in modern times is towards a repudiation of the fiction of an implied contract as the basis of the right, and towards a return to the doctrines of the courts of equity.<sup>4</sup>

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<sup>1</sup> *Craythorne v. Swinburne*, 14 Ves. 169; *Norton v. Coons*, 6 N. Y. 33; *Campbell v. Messier*, 4 Johns. Ch. 337; *Barry v. Ransom*, 12 N. Y. 462; *Monson v. Drakeley*, 40 Conn. 552; *Wells v. Miller*, 66 N. Y. 255. See *Dennis v. Gillespie*, 24 Mo. 351.

<sup>2</sup> *Russell v. Tailer*, 1 Ohio St. 327.

<sup>3</sup> *Camp v. Bostwick*, 20 Ohio St. 337; S. C. 5 Am. R. 669.

<sup>4</sup> It would seem to be a matter of little importance whether the right of contribution is to be deemed an equitable right based upon principles of natural justice only, or whether it is to be deemed a legal right, founded upon a contract implied from the presumption that the sureties contracted with reference to the well settled principles of equity applicable to the relation which they assumed on becoming bound with a common principal. But as the natural result of the assumption of equity jurisdiction by a common law court, the court first created the fiction of an implied contract as the basis of its jurisdiction, and then applied the strict and rigid rules of the common law to the contract so created; and, in effect, declared that, two or more sureties by signing a note, as clearly fixed and defined their liabilities to each other as to the payee therein named; that, in the one case the parties defined their liabilities in express terms; and in the other the law defined them in terms equally express, and thus settled, as between the sureties, the legal effect of subscribing their names to the note; and that they should be bound by the same rules that they would be if their contract had been fully written above their signatures. This prohibited a party defending an action for contribution from showing that he was not in fact a co-surety with the plaintiff by proof of a parol agreement to that effect, the court proceeding upon the theory that to permit such proof to be given would be to permit a parol agreement to vary the operation of the contract of the surety as defined by law, and subscribed to by him, and thus, in effect, made his written agreement. See *Norton v. Coons*, 6 N. Y. 33. Thus, by a fiction of the law based upon principles of equity, a surety is forced into a relation he never assumed, bound by a contract he never made, and subjected to liabilities he had expressly contracted against. For a more liberal rule, see *Craythorne v. Swinburne*, 14 Ves. 160; *Hunt v. Chambliss*, 7 Sur. & M. (Miss.) 533; *Barry v. Ransom*, 12 N. Y. 462; *Paulin v. Kaighn*, 3 Dutch. (N. J.) 503; *Robinson v. Lyle*, 10 Barb. 512; *Anderson v. Pearson*, 2 Baily, L. (S. C.) 107; *Robertson v. Deatherage*, 82 Ill. 511; *Hendrick v. Whittemore*, 105 Mass. 23.

SECTION 2.—*Between persons bound by different instruments, etc.*

It is a general principle that the right of contribution exists only among those who are sureties for the same thing, and bound for the same debt or duty.<sup>1</sup> But in determining the question of co-suretyship, equity has respect to substance rather than form, and to the arrangement which the parties have entered into, rather than the instruments by which their engagements are evidenced.<sup>2</sup> If several persons, or sets of persons, enter into contracts of suretyship, which are the same in their legal operation and character, though by different instruments,<sup>3</sup> at different times,<sup>4</sup> and without the knowledge of each other,<sup>5</sup> they will be bound to mutual contribution.

But it is not enough that the parties are all sureties; they must occupy the same position in respect to the principal, and be without equities between themselves, giving to one an advantage over the other.<sup>6</sup> For the

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<sup>1</sup> *Monson v. Drakeley* 40 Conn. 552; S. C. 16 Am. R. 74; *Armitage v. Pulver*, 37 N. Y. 494; *Warner v. Price*, 3 Wend. 397.

<sup>2</sup> *Monson v. Drakeley*, 40 Conn. 552; S. C. 16 Am. R. 74; *Bell v. Jasper*, 2 Ired. Ch. 597; *Deering v. Earl of Winchelsea*, 2 Boss. & Pull. 273; *Mayhew v. Crichtett*, 2 Swanst. 198.

<sup>3</sup> *Armitage v. Pulver*, 37 N. Y. 494; *Bosley v. Taylor*, 5 Dance, 157; *Bell v. Jasper*, 2 Ired. Ch. 597.

Where one of several sureties has been compelled to pay the amount of a judgment against the principal, he may compel contribution from sureties in a second bond for the same principal, executed as security for the same subject-matter. *Bosley v. Taylor*, 5 Dana, 157. The rights and obligations of sureties, as between themselves, are the same, whether bound under one or several like obligations for the same principal, and for the same debt or default.

<sup>4</sup> *Monson v. Drakeley*, 40 Conn. 522.

<sup>5</sup> *Craythorne v. Swinburne*, 14 Ves. 160; *Norton v. Coons*, 3 Denio, 130; *Campbell v. Mesier*, 4 Johns. Ch. 337; *Chaffee v. Jones*, 19 Pick. 260.

<sup>6</sup> *Wells v. Miller*, 66 N. Y. 255; *Hinckley v. Kreitz*, 58 N. Y. 583; *McCrory v. Parks*, 18 Ohio St. 1. A person who signs a note as surety for one who is himself only a surety for the principal maker, is not liable in a suit for contri-

purpose of showing an equitable defense to a claim for contribution, it is competent to prove, by parol, the relation of the parties, that one surety agreed to indemnify the other, or any extrinsic fact affecting the equities between them.<sup>1</sup>

So far as mutuality in contribution in fact exists, it does not depend on the relation of joint makers of an obligation, but entirely on that of co-suretyship. The signature of a surety is not joint in its character but several, and co-sureties may sign a paper at different times, and, indeed, different papers, and in ignorance of the undertakings of each other, and still preserve their mutuality in respect to contribution. A party may be so situated as not to be liable to the holder of a promissory note as maker, and, therefore, not in condition to seek contribution from other parties who are sureties, and still retain to them such relation that, in the event of payment by one of them, he will be liable to contribute. So, a person may sign an obligation after its original execution and delivery, and not thereby render himself liable to the payee as a maker, yet, if he intended to become a co-surety with others, who, as to the payee, are joint and several makers, and, as to each other, are co-sureties, he will be liable to contribution.<sup>2</sup>

A guarantor of the collection of a note is in no sense in privity with the sureties therein. His undertaking is

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bution to the one for whom he signed as surety. *Robertson v. Deatherage*, 82 Ill. 511. The sureties on a bond given by an administrator when he procures an order for the sale of real estate, are not co-sureties with the sureties in the original administration bond, and hence are not liable for contribution. *Salysers v. Ross*, 15 Ind. 130; and a surety for the repayment of a loan, who, by a previous arrangement, made without the knowledge of his co-surety, with the principal debtor, receives a share of the money loaned, is not entitled to contribution on payment of the debt. *McPherson v. Talbot* 5 Gill & J. 499.

<sup>1</sup> *Wells v. Miller*, 66 N. Y. 255; *Blake v. Cole*, 22 Pick. 97.

<sup>2</sup> *Monson v. Drakeley*, 40 Conn. 552.

collateral to theirs and independent of it. He is not liable to them for contribution, nor can he claim it from them ; and, if he pays the debt, his only remedy is against his principal for indemnity,<sup>1</sup> but as between co-guarantors the right of contribution exists.<sup>2</sup> A surety on a promissory note cannot enforce contribution as against an indorser, but he may as against one who appears to be an indorser, but who is, in fact, a surety. To maintain the action he must show affirmatively that the real engagement of the defendant was that of a surety.<sup>3</sup>

SECTION 3.—*When the undertaking is not joint but separate and successive.*

While sureties are bound to contribute equally to the satisfaction of a debt they have jointly undertaken to pay, they are not liable to contribute where the undertaking is not joint but separate and successive.<sup>4</sup>

A supplemental surety, or surety for a surety, is not entitled to contribution,<sup>5</sup> and is not liable to contribute to the other sureties,<sup>6</sup> because his engagement extends to their responsibility as well as that of the maker.

If a person signs a note as surety under an express understanding with the payee, he does not become a joint surety with the prior surety, and is not liable to contribution, although the first surety signed the note under the supposition that the other would sign it as co-surety.<sup>7</sup>

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<sup>1</sup> Monson v. Drakeley, 40 Conn. 552; Longley v. Griggs, 10 Pick. 121.

<sup>2</sup> Golsen v. Brand, 75 Ill. 148.

<sup>3</sup> Nurre v. Chittenden, 56 Ind. 462.

<sup>4</sup> McDonald v. Magruder, 3 Pet. 470.

<sup>5</sup> Knox v. Valandingham, 13 S. & M. 526; Robertson v. Deatherage, 82 Ill. 511; Dawson v. Pettway, 4 Dev. & Batt. 396; Thompson v. Sanders, 4 Dev. & Batt. 404.

<sup>6</sup> Monson v. Drakeley, 40 Conn. 552.

<sup>7</sup> Adams v. Flanagan, 36 Vt. 400.

Where sureties are bound by different instruments for equal portions of a debt due from the same principal, and the suretyship of each is a separate and distinct transaction, there is no right of contribution between them.<sup>1</sup> Where several parties are sureties for the payment of one sum of money, though by distinct instruments, and one pays more than an equal share of that sum, he may, as has been stated, have contribution from his co-sureties. But if it is arranged by contract, as it may be, that each surety is to be answerable for a given portion of one sum of money, there is no right of contribution among the co-sureties.<sup>2</sup>

It is well settled that co-sureties may, by an agreement between themselves, so far sever their unity of interest and obligation as to terminate their right of contribution.<sup>3</sup> Where there are several distinct bonds, with different penalties, contribution will be decreed between the sureties in proportion to the penalties of their respective bonds.<sup>4</sup>

When a person signs a note as surety of another, and then a third person signs his name to the note, adding to his signature the words "surety to the above," the first surety cannot, upon paying the note, compel contribution from the second surety, unless it is made to appear that the second surety intended to place himself in the relation of a co-surety with the first.<sup>5</sup> And whenever it appears that the parties never contemplated that a second surety should be liable, except on default of the principal and the prior surety, the prior surety cannot claim con-

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<sup>1</sup> *Coope v. Twynam*, 1 Turn. & Russ. 426.

<sup>2</sup> *Pendlebury v. Walker*, 4 Y. & C. 424.

<sup>3</sup> *Paul v. Barry*, 78 Ill. 158; *Robertson v. Deatherage*, 82 Ill. 511.

<sup>4</sup> *Armitage v. Pulver*, 37 N. Y. 494; *Deering v. Earl of Winchelsea*, 2 Bos. & Pull. 273; *Story's Eq. Jur.* § 497.

<sup>5</sup> *Thompson v. Sanders*, 4 Dev. & Batt. 404; *Harris v. Warner*, 13 Wend. 400. See *Sayles v. Sims*, 73 N. Y. 551.

tribution from the second surety.<sup>1</sup> Thus, where a sheriff has become dissatisfied with the bond given by one of his deputies, and required the deputy to furnish a new bond with other sureties, who execute it upon the express agreement that they should not be called upon while the sureties in the prior bond are residents of the State, and the sheriff can be indemnified for any misconduct of the deputy without recourse to them, the sureties in such second bond cannot be compelled to contribute to the sureties in the first bond, although the latter have been compelled to pay a judgment recovered against him on their undertaking.<sup>2</sup>

Where a judgment is obtained against a principal and his sureties, and a levy is made upon the property of the principal only, a person who gives his bond that the property shall be forthcoming, and is obliged to pay the debt, cannot claim contribution from the sureties.<sup>3</sup>

The indorser of a bill for the accommodation of the principal obligor is not, unless by force of a special contract to that effect, liable to contribute as a co-surety to one who signed the bill as co-obligor with the principal. The indorser, in such case, is to be taken only as supplemental surety, and is not liable to be called on for contribution by the primary surety.<sup>4</sup>

SECTION 4.—*Where sureties are bound for the same principal, but not for the same thing.*

It is not enough, to give a right of contribution between sureties, that they are bound for the same principal,

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<sup>1</sup> Harrison v. Lane, 5 Leigh, 414; Robertson v. Deatherage. 82 Ill. 511.

<sup>2</sup> Harrison v. Lane, 5 Leigh, 414.

<sup>3</sup> Dunlap v. Foster, 7 Ala. 734. See Hammock v. Baker. 3 Bush (Ky.), 77.

<sup>4</sup> Dawson v. Pettway, 4 Dev. & Batt. 396.



by the same instrument or otherwise, if they are not also bound for the same thing.<sup>1</sup>

Thus, where an administrator has given the ordinary administration bond, with sureties, and has afterwards given an additional bond on obtaining an order for the sale of real estate, conditioned as required by law, the sureties on the additional bond will not be liable to contribution in case the sureties on the original bond are compelled to pay on account of the default of their principal.<sup>2</sup> But where an administrator has given two bonds *containing the same condition*, one when letters are issued, and the other when an order is made for the sale of the real estate of the intestate, the sureties in the several bonds, having assumed a common burden, are, as between themselves, liable to contribution.<sup>3</sup> So, where a judgment has been rendered against a principal, and he replevies the debt, his surety for the debt is under no obligation to refund to the sureties in the replevin bond the sum they may be compelled to pay, even though the original surety also replevies the debt by a separate bond.<sup>4</sup> But if the defendant in an execution replevies it, and gives bonds, and a judgment on the replevin bonds is enjoined, a surety in the injunction bond, who is compelled to pay the execution, may enforce contribution from the sureties in the replevin bonds.<sup>5</sup>

If, by reason of the default of a deputy, the sureties of a sheriff are compelled to pay, they may recover the

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<sup>1</sup> *Monson v. Drakeley*, 40 Conn. 552; *Armitage v. Pulver*, 37 N. Y. 494; *Warner v. Rice*, 3 Wend. 397.

<sup>2</sup> *Salysers v. Ross*, 15 Ind. 130.

<sup>3</sup> *Powell v. Powell*, 48 Cal. 235. Administrators who give a joint bond are liable, each to the other, as sureties. *Collins v. Carlisle*, 7 B. Mon. 13; *Boyd v. Boyd*, 3 Gratt. 113; *Braxton v. State*, 25 Ind. 82; *Newton v. Newton*, 53 N. H. 537; *Moore v. State*, 49 Ind. 558.

<sup>4</sup> *Hammock v. Baker*, 3 Bush (Ky.), 208.

<sup>5</sup> *Brandenburgh v. Flynn*, 12 B. Mon. 397.

amount paid from the sureties of the deputy. But this right of recovery is not based upon the principle of contribution.<sup>1</sup>

SECTION 5.—*Between accommodation indorsers.*

In some cases, it has been held that the several indorsers for the accommodation of the maker of a promissory note do not sustain the relation of co-sureties to each other, so as to create a liability to contribute to the one paying the note;<sup>2</sup> and that a second indorser of an accommodation note is not liable for contribution to the first indorser who has paid the note.<sup>3</sup>

But, under the Revised Code of Georgia, accommodation indorsers of negotiable securities, payable at a chartered bank, are treated as mere sureties,<sup>4</sup> and the indorser who has been obliged to pay the note can compel contribution from the other indorsers.<sup>5</sup> A surety cannot exact contribution from an indorser, but the indorser may be shown to be a co-surety.<sup>6</sup> An accommodation indorser of a bill of exchange is not liable to contribution at the suit of an accommodation acceptor;<sup>7</sup> nor will an accommodation indorser be liable to contribute towards a payment by an accommodation maker of a promissory note.<sup>8</sup> But it is always competent to show the true relation of the parties; and if it appears that parties to a note are in fact co-sureties, and that, as between themselves, there are no circumstances giving one

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<sup>1</sup> *Brinson v. Thomas*, 2 Jones Eq. (N. C.) 414.

<sup>2</sup> *Aiken v. Barkley*, 2 Speers, 747; *Braham v. Rayland*, 3 Stew. 247. See *Douglas v. Waddle*, 1 Ham. 413.

<sup>3</sup> *Wilson v. Stanton*, 6 Blackf. 507.

<sup>4</sup> Revised Code, §§ 2123, 2738, 2739.

<sup>5</sup> *Freeman v. Cherry*, 46 Ga. 14.

<sup>6</sup> *Nurre v. Chittenden*, 56 Ind. 462.

<sup>7</sup> *Gamez v. Lazarus*, 1 Dev. Ch. 205.

<sup>8</sup> *Smith v. Smith*, 1 Dev. Ch. 173.

an undue advantage over the others, the right of contribution may be enforced, without regard to the form of their contract.

SECTION 6.—*When the right accrues.*

The liability of sureties to contribution attaches as soon as one of them has been obliged to pay more than his proportion of the debt of their common principal.<sup>1</sup> As to the one making the payment, his right to contribution accrues at the time of the payment, and not till then.<sup>2</sup>

As to the character of the payment which will give a right to compel contribution there is a conflict of authorities. In some cases it has been held, that, if one of two sureties satisfies the debt by giving his own negotiable note for the amount, he may sue his co-surety for contribution before he has paid the note.<sup>3</sup> But, on the other hand, it has been held that, to entitle a surety to recover contribution from a co-surety, he must be able to prove an actual payment in money or money's worth; and that it is not sufficient to show that he gave his note for the debt, and that it was accepted by the creditor as a payment.<sup>4</sup>

SECTION 7.—*Voluntary payment.*

The question, whether a surety shall be allowed to recover contribution from his co-surety after actual pay-

<sup>1</sup> Caldwell v. Roberts, 1 Dana, 355; Bradley v. Burwell, 3 Denio, 61.

<sup>2</sup> Stallworth v. Preslar, 34 Ala. 505; Broughton v. Robinson, 11 Ala. 922; Smith v. State, 46 Md. 617; Magruder v. Admire, 4 Mo. App. 133. It has been held, however, that a surety may, before he has paid the debt, file a bill against his co-surety to compel him to contribute. McKenna v. George, 2 Rich. Eq. 15.

<sup>3</sup> White v. Carlton, 52 Ind. 371; Atkinson v. Stewart, 2 B. Mon. 348.

<sup>4</sup> Brisendine v. Martin, 1 Ired. 286; Nowland v. Martin, Id. 307.

ment of the debt of the common principal, may further depend upon the question, whether the payment was voluntarily made, or whether it was made under legal compulsion.

The right exists only, where one person, standing in the relation of a surety, has become legally liable to pay the obligation of his principal, and has paid the debt, or more than his proportionate share of it, under the legal compulsion arising from such liability. The right does not exist as to mere voluntary payments.<sup>1</sup>

If a surety, with full knowledge of all the facts, but under a mistaken belief as to liability, makes a payment, when, in fact, he is under no legal obligation to do so, the payment will be regarded as voluntary, and he will not be entitled to claim contribution.<sup>2</sup> But where sureties are sued upon a note to which a defense might be successfully interposed, but of which they have no knowledge, and one of them in good faith, and without negligence, pays the note before judgment, the payment will not be regarded as voluntary, and the paying surety may enforce contribution from his co-sureties.<sup>3</sup> Thus, a surety, who pays a note, upon which he has been sued, in ignorance of the fact that the defense of usury might be successfully interposed to the action, may recover contribution from his co-sureties, notwithstanding the existence of the defense.<sup>4</sup>

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<sup>1</sup> *Hitchborn v. Fletcher*, 66 Me. 209; 22 Am. R. 562.

<sup>2</sup> *Bancroft v. Abbott*, 3 Allen, 524.

<sup>3</sup> *Hitchborn v. Fletcher*, 66 Me. 209; S. C. 22 Am. R. 562.

<sup>4</sup> *Warner v. Morrison*, 3 Allen, 566. In this connection, see *Beal v. Brown*, 13 Allen, 114, in which it was held, that one who has given an oral guaranty of the debt of another, at his request, may recover indemnity from his principal, notwithstanding the defense of the statute of frauds; also, *Conn v. Coburn*, 7 N. H. 368, in which the court held, that a surety on a note, given by an infant for necessities, might pay it, and recover indemnity from the infant.

A payment is not regarded as voluntary within the meaning of the rule above stated, merely because it is made before the creditor has resorted to his legal remedy to enforce it. A surety is not obliged to delay payment until suit brought in order to protect his right of contribution;<sup>1</sup> and if an action has been commenced against him, he is not obliged to wait until his liability has been declared by judgment, or enforced by execution, in order to protect his right. Payment after suit brought is in no sense voluntary.<sup>2</sup>

SECTION 8.—*Contracts of suretyship entered into by request of co-surety, &c.*

It is a general rule that one who becomes a surety, at the request of a co-surety, is not liable to the latter for contribution,<sup>3</sup> especially if the co-surety, at the time of making the request, promised to indemnify the other from loss in case he should become a surety with him.<sup>4</sup> But the cases are not harmonious upon this point; and it has been held, that a surety upon a bond will not be discharged from liability for contribution merely because he signed the bond at the request of his co-surety, where the parties stand in equal relations to the princi-

<sup>1</sup> Pitt v. Purssord, 8 M. & W. 538; Hitchborn v. Fletcher, 66 Me. 209; S. C. 22 Am. R. 562; Linn. v. McClelland, 4 Dev. & Batt. 458; Bond v. Bishop, 18 La. Ann. 549; Judah v. Mieuve, 5 Blackf. 171; Lucas v. Guy, 2 Bailey, L. 403.

<sup>2</sup> Hitchborn v. Fletcher, 66 Me. 209; Stallworth v. Preslar, 34 Ala. 505.

If a surety on a bail bond voluntarily satisfies the judgment recovered against his principal after execution issued, and *non est inventus* returned, but before *scira facias* served and entered, he cannot compel contribution from his co-surety. Skillin v. Merrill, 16 Mass. 40. See Randolph v. Randolph, 3 Rand. (Va.) 490.

<sup>3</sup> Byers v. McClannhan, 6 Gill. & J. 250; Daniel v. Ballard, 2 Dana, 296; Turner v. Davies, 2 Exp. 478; Cutter v. Emery, 37 N. H. 567.

<sup>4</sup> Barry v. Ransom, 12 N. Y. 462; Blake v. Cole, 22 Pick. 97; Bagott v. Mullen, 32 Ind. 332. See Jones v. Letcher, 13 B. Mon. 363.

pal, and there is no express promise for indemnity, or where the party making the request does not receive any benefit from the execution of the obligation.<sup>1</sup> An oral promise to indemnify a person against loss, if he will become surety with the promissor on a bond or obligation already executed by him, is valid and binding between the parties to the agreement.<sup>2</sup>

SECTION 9.—*Effect of indemnity given to co-surety.*

Whether a surety, who has been fully indemnified against loss by his principal, can maintain an action against his co-surety for contribution after payment of his principal's debt, is not conclusively settled by the authorities. It would seem clearly inequitable to permit the paying surety to compel his co-surety to contribute towards a payment of the debt of the principal, while he has in his hands funds or property of such principal sufficient to fully reimburse him for such payment; and it has been held, that a surety, so indemnified, has no right to contribution against his co-surety, but must save himself harmless out of the means placed in his hands for that purpose.<sup>3</sup>

But, on the other hand, it has been held that the fact that the paying surety has received from his principal, some indemnity, other than money, will not prevent him from maintaining an action for contribution against his co-surety, and recovering therein, such sum as he is then entitled to irrespective of what may be subsequently realized from the indemnity.<sup>4</sup> The co-surety will, how-

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<sup>1</sup> Bagott v. Mullen, 32 Ind. 332.

<sup>2</sup> Ferrell v. Maxwell, 28 Ohio St. 383.

<sup>3</sup> Morrison v. Taylor, 21 Ala. 779.

<sup>4</sup> Johnson's Admrs. v. Vaughn, 65 Ill. 425; Paulin v. Kaighn, 5 Dutch. (N. J.) 480.

ever, be entitled to his proper proportion of the proceeds of the indemnity.

If a surety, who has been indemnified by his principal, without the consent of his co-sureties, releases or discharges the securities received for his indemnity,<sup>1</sup> or sells and disposes of the property, by which, he was secured, and fails to collect the proceeds,<sup>2</sup> he cannot call upon his co-sureties for contribution as to the amount so released or wasted. A surety secured by mortgage must use reasonable diligence to appropriate the mortgage to the payment of his claim, and if by reason of his laches, the mortgage fails to fully indemnify him, he cannot claim contribution from his co-sureties.<sup>3</sup> He is not, however, bound to enforce his mortgage before he pays the debt, or has reason to suppose that he must pay it, unless the mortgagor is wasting the estate. But, if the mortgagor is wasting the estate, and the surety fails to enforce his rights, he is chargeable, as between himself and his co-sureties, with the fair value of the property at a forced sale.<sup>4</sup>

If, on the contrary, the property conveyed to the surety for his indemnity, has been faithfully applied towards the extinguishment of the debt, but has proved insufficient to satisfy it in full, the surety who has been so indemnified, on paying the balance of the debt, may have contribution as to the balance paid by him.<sup>5</sup> So, if the surety, in good faith, but without the knowledge of his co-sureties, exchanges the securities held by him for his indemnity for others, he does not thereby discharge

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<sup>1</sup> *Taylor v. Morrison*, 26 Ala. 728 ; *Roberts v. Sayre*, 6 Monr. 188 ; *Paulin v. Kaighn*, 5 Dutch. (N. J.) 480 ; *Ramsey v. Lewis*, 30 Barb. 403.

<sup>2</sup> *Chilton v. Chapman*, 13 Mo. 470.

<sup>3</sup> *Goodloe v. Clay*, 6 B. Mon. 236.

<sup>4</sup> *Teeter v. Pierce*, 11 B. Mon. 399. See *Kerns v. Chambers*, 3 Ired. Eq. 576.

<sup>5</sup> *John v. Jones*, 16 Ala. 454. See *Batchelder v. Fiske*, 17 Mass. 464.

his co-sureties from contribution.<sup>1</sup> But before an indemnified surety can enforce contribution against co-sureties who have not been indemnified, he must show that the property taken as indemnity has been properly disposed of, without having satisfied the debt for which he claims contribution.<sup>2</sup>

The question as to the right of a surety to claim compensation from his co-surety, may become still further complicated by the fact that the paying surety is also a creditor of the principal, and has taken security generally for his indemnity as a creditor and as a surety. The question as to the application of such indemnity will be discussed elsewhere.<sup>3</sup> When this question has been determined, the other question, as to the right of the paying surety to contribution, notwithstanding the indemnity applicable to his liability as surety, involves the principles hereinbefore discussed, and those only.

#### SECTION 10.—*Prior proceedings against the principal as a condition precedent.*

A surety is not compelled to pursue his remedy against the principal before he seeks contribution from his co-surety;<sup>4</sup> nor is he bound to show that the principal is unable to pay the debt,<sup>5</sup> unless the right of the surety to the remedy pursued is made by the statute to depend

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<sup>1</sup> *Carpenter v. Kelly*, 9 Ham. 106.

<sup>2</sup> *Morrison v. Poyntz*, 7 Dana, 307. It has been held in New Hampshire that a surety who holds partial indemnity, in the form of property of his principal, can recover from his co-surety only one half the amount paid, after deducting the value of the property. *Currier v. Fellows* 27 N. H. 366.

<sup>3</sup> See *Brown v. Ray*, 18 N. H. 102; *Goodloe v. Clay*, 6 B. Mon. 236; *Moore v. Moore*, 4 Hawks, 358; *Thompson v. Adams*, 1 Freem. Ch. 225.

<sup>4</sup> *Caldwell v. Roberts*, 1 Dana, 355.

<sup>5</sup> *Odlin v. Greenleaf*, 3 N. H. 270; *Rankin v. Collin*, 50 Ind. 158; *Sloo v. Pool*, 15 Ill. 47.



upon the insolvency of the principal.<sup>1</sup> A surety who has been compelled to pay the debt may maintain an action at law against his co-surety, whether the principal debtor is insolvent or not.<sup>2</sup>

In a number of cases it has been held that a court of equity will not compel a surety in a bond to contribute to a co-surety, who has been compelled to pay the debt, unless it appears that due diligence was used, without effect, to obtain reimbursement from the principal obligor, or that he was insolvent.<sup>3</sup>

#### SECTION 11.—*How death of co-surety affects the right.*

Upon the death of one of the sureties in a joint obligation, the estate of the deceased surety is absolutely discharged from the payment thereof, both in law and equity. If the right of contribution was founded upon the contract of suretyship, the death of the surety in such obligation would terminate the right to enforce contribution against the estate of the deceased surety. But, as we have seen, the right of contribution is not founded upon the contract of suretyship, and the death of one of several co-sureties, whether in a joint, or joint and several obligation, will not release his estate from liability to contribution. On the contrary, the surety who has paid the debt has the same right to contribution from the representatives of the deceased surety as from the surviving sureties.<sup>4</sup>

<sup>1</sup> See *Batson v. Laselle*, 1 Blackf. 119; *Roberts v. Adams*, 6 Port. 361.

<sup>2</sup> *Judah v. Mieure*, 5 Blackf. 171; *Linn v. McClelland* 4 Dev. & Batt. 458.

<sup>3</sup> *McCormack v. Obannon*, 3 Mumf. 484; *Bolling v. Donegley*, 1 Duval. (Ky.) 220; *Daniel v. Ballard*, 2 Dana, 296; *Allen v. Wood*, 3 Ired. Ch. 386. See *Schmidt v. Coulter*, 6 Minn. 492.

<sup>4</sup> *Conover v. Hill*, 76 Ill. 342; *Camp v. Bostwick*, 20 Ohio St. 337; *McKenna v. George*, 2 Rich. Eq. 15; *Bradley v. Burwell*, 3 Denio 61; *Cornes v. Wilkin*, 14 Hun, 428. See *Primrose v. Bromley*, 1 Atk. 90; *Batard v. Hawes*, 2 E. & B. 287.

"The right of action, as between the sureties, grows out of the original implied agreement that if one shall be compelled to pay the whole, or a disproportionate part of the debt, the other will pay such sum as will make the common burden equal. In case of the death of either, this obligation devolves upon his legal representatives. In this respect it is like any other contract made by one in his lifetime, to pay money at a future time, absolutely or contingently, who dies before the occurrence of any breach of the contract."<sup>1</sup>

In joint contracts generally, the remedy, in case of the death of one of the obligors, is against the survivors only. But in case of sureties, the promise implied by law is not joint but several; each is liable to the others for his part only, and not for the part of any other of the sureties.<sup>2</sup>

When one of two sureties dies, and his executor pays all the money for which both became liable, without having the claim allowed in the probate court, he can recover, as executor, against the co-surety, in an action for contribution.<sup>3</sup>

If the surviving surety pays the debt, the representatives of the deceased surety are liable for interest;<sup>4</sup> and if the survivor defends the action on the principal obligation, and succeeds in reducing the amount of the recovery, the representatives of the deceased surety are liable to contribute for the costs.<sup>5</sup>

<sup>1</sup> Jewett, J. *Bradley v. Burwell*, 3 Denio, 61. How far the right of contribution is founded on an implied agreement has been considered in a preceding section of this chapter.

<sup>2</sup> *Akin v. Peay*, 5 Strobh. 15.

<sup>3</sup> *Dussol v. Bruguire*; 50 Cal. 456.

<sup>4</sup> *Akin v. Peay*, 5 Strobh. 15; *Lawten v. Wright*, 1 Cox 275; *Swain v. Wall*, 1 Ch. R. 149; *Petre v. Duncombe*, 15 Jur. 86; *Hitchman v. Stewart*, 3 Drew. 271. But see *Ouge v. Truelock*, 2 Moll. 31; *Bell v. Free*, 1 Swanst. 90; *Rigby v. McNamara*, 2 Cox, 415.

<sup>5</sup> *McKenna v. George*, 2 Rich. Eq. 15.

SECTION 12.—*Statute of Limitations as a bar.*

The statute of limitations begins to run against a claim for contribution from the time of the payment of the money for the principal by the paying surety.<sup>1</sup> As against the estate of a deceased person, the claim may be barred by the short statute. Thus, where a statute provides that if a claim against the estate of a deceased person shall be presented to the executor or administrator, and shall be rejected by him, and shall not have been referred, and a suit therefor commenced within six months after such rejection, it shall be forever barred, a claim for contribution, so presented and rejected, and not referred or sued, will be forever barred.<sup>2</sup>

Where a judgment has been recovered against a surety, and he has paid the debt, he cannot recover contribution against a co-surety, as to whom the action was barred at the date of the judgment.<sup>3</sup>

But when the estate of a deceased surety has become discharged from liability to the creditor by the operation of the statute, and a co-surety afterwards pays the debt, the estate is liable to the paying surety for contribution, notwithstanding that it was released from direct liability to the creditor.<sup>4</sup>

SECTION 13.—*Effect of a discharge in bankruptcy.*

Where a surety is discharged from his obligation to answer for the demand against his principal by a discharge in bankruptcy, he is not liable to his co-surety for contribution.<sup>5</sup> And where a judgment has been recov-

<sup>1</sup> *Sherrod v. Woodard*, 4 Dev. 360; *Powder v. Carter* 12 Ired. 242. See *Loughridge v. Bowland*, 52 Miss. 546.

<sup>2</sup> *Cornes v. Wilkin*, 14 Hun, 428.

<sup>3</sup> *Shelton v. Farmer*, 9 Bush (Ky.), 314.

<sup>4</sup> *Camp v. Bostwick*, 20 Ohio St. 337; S. C. 5 Am. R. 669.

<sup>5</sup> *Tobias v. Rogers*, 13 N. Y. 59.

ered against a principal and his sureties, and one of them pays the judgment and the other is discharged in bankruptcy, the paying surety cannot enforce contribution against the bankrupt, as the claim for contribution is included in the operation of the discharge.<sup>1</sup>

#### SECTION 14.—*Extent of the right.*

As the right of contribution depends upon principles of equity, and owes its origin to the maxim that equality is equity, the right cannot be enforced beyond what is just and equitable, nor beyond the point where the parties will stand on terms of equality. A surety will not be allowed to make the equitable right a means of oppression or a means of speculation. If a surety has bought up the demand of the creditor at a discount, he will be limited to contribution as to the amount actually paid rather than to the face of the demand.<sup>2</sup> If he has made the payment in depreciated paper, he can enforce contribution only as to the actual value of the paper at that time.<sup>3</sup> If the debt was paid by a transfer of land, the price at which it was taken by the creditor will, ordinarily, furnish the basis of the calculation of the amount recoverable, but, in any event, no more than the value of the land at the time should be allowed.<sup>4</sup> If the surety has paid his half of the principal obligation, and joined in a note with his co-surety for the other half, and has afterwards paid a judgment recovered on this note, he is entitled to recover of his co-surety, not only the amount of the note but also the necessary costs of the suit.<sup>5</sup>

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<sup>1</sup> Hays v. Ford, 55 Ind. 52. See Letcher v. Yantis, 3 Dana, 160.

<sup>2</sup> Fuselier v. Babineau, 14 La. Ann. 764; Tarr v. Ravenscroft, 12 Gratt. 642; Sinclair v. Redington, 56 N. H. 146.

<sup>3</sup> Jordan v. Adams, 2 Eng. 348; Edmunds v. Sheaham, 47 Texas, 443.

<sup>4</sup> Jones v. Bradford, 25 Ind. 305.

<sup>5</sup> McKee v. Campbell, 27 Mich. 497,

As a general rule, a surety who defends an action cannot successfully claim contribution for costs unless he was authorized by his co-sureties to defend,<sup>1</sup> or the defense was made under such circumstances as to be regarded as prudent,<sup>2</sup> or the defense has resulted in reducing the plaintiff's demand.<sup>3</sup>

The obligation of the surety to the creditor is to pay the whole debt. If he does so, he may recover of his co-surety, if there is but one, one-half of the amount paid; if he pays less than the whole debt, he can recover from his co-surety only the amount which he has paid in excess of his moiety.<sup>4</sup> If, by the conduct of the creditor, a co-surety has been released from liability, another co-surety will be exonerated only as to so much of the original debt as the one so discharged could have been compelled to pay.<sup>5</sup> If several sureties have become bound for the same principal and the same debt by different bonds with different penalties, contribution between them will be enforced in proportion to the penalties of their respective bonds.<sup>6</sup> If the surety has been indemnified, and has realized on his securities a portion of the debt, or has improperly released a part of the property given him as indemnity, or has suffered it to become worthless as a security, this will operate as a payment *pro tanto* of the debt of the principal, and the right of contribution will be limited to the balance unsatisfied.<sup>7</sup>

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<sup>1</sup> Hitchborn v. Fletcher, 66 Me. 209; 22 Am. R. 562; De Colyar on Guar. 348; Comegys v. State Bank, 6 Ind. 357.

<sup>2</sup> Fletcher v. Jackson, 23 Vt. 581. See Davis v. Emerson, 5 Shep. 64.

<sup>3</sup> McKenna v. George, 2 Rich. Eq. 15.

<sup>4</sup> Morgan v. Smith, 70 N. Y. 537; Lowell v. Edwards, 2 Boss. & Pull. 268; Browne v. Lee, 6 Barn. & Cress. 689; Peter v. Rich, 1 Ch. R. 34; Deering v. Earl of Winchelsea, 2 Boss. & Pull. 270.

<sup>5</sup> Morgan v. Smith, 70 N. Y. 537; Stirling v. Forrester, 2 Bligh, 575; *Ex parte* Gifford, 6 Ves. 805; Mayhew v. Critchett, 2 Swanst. 185; Hodgson v. Hodgson, 2 Keen, 704.

<sup>6</sup> Armitage v. Pulver, 37 N. Y. 494.

<sup>7</sup> See *ante*, p. 312.

SECTION 15.—*Where some of the co-sureties are absent or insolvent.*

Where there are several sureties in a joint obligation, and a part of them have left the State, and three only remain, those who remain are bound to contribute in equal proportions; and if one of them pays the debt, he may recover one-third of the whole sum from each of the others.<sup>1</sup> But if one or more of several sureties in a joint bond becomes insolvent, the surety who pays the entire debt can recover of the solvent sureties, at law, only his aliquot part in reference to the whole number of sureties.<sup>2</sup>

An action at law for contribution must be against each of the sureties separately for his proportion, and no more can be recovered from either of the co-sureties, at law, even where one or more of the others are insolvent. In case some of the sureties are insolvent, the paying surety should seek contribution in equity, and bring the suit against all the co-sureties, and upon proof of the insolvency of one or more of them, the court will adjudge payment of the amount among the solvent sureties in due proportion.<sup>3</sup>

<sup>1</sup> McKenna v. George, 2 Rich. Eq. 15; Bordman v. Paige, 11 N. H. 431.

<sup>2</sup> Stothoff v. Dunham, 4 Har. 181. See Magruder v. Admire, 4 Mo. App. 133, holding that the measure of a co-surety's liability for contribution is controlled by the number of sureties who remain solvent.

<sup>3</sup> Easterly v. Barber, 66 N. Y. 433, 439. See, also, 1 Pars. on Cont. 34; Brown v. Lee, 6 Barn. & Cress. 689; Cowell v. Edwards, 2 Boss. & Pull. 268; Beaman v. Blanchard, 4 Wend. 432, 435; Story's Eq. Jur. § 469; 1 Chitty on Cont. (5 Am. ed.) 597, 598; Willard's Eq. Jur. 108; Cobb v. Haynes, 8 B. Mon. 137; Dodd v. Winn, 27 Mo. 504; Stothoff v. Dunham, 19 N. J. Law, 181; Samuel v. Zachery, 4 Ired. Law. 377; Peter v. Rich, 1 Ch. R. 34; Hole v. Harrison, 1 Ch. Cas. 246; Rogers v. McKenzie, 4 Ves. 752; Hitchman v. Stewart, 3 Drew, 271; Wright v. Hunter, 5 Ves. 927; Batard v. Hawes, 2 E. & B. 287. If one of a number of sureties discharge the common burden, the others are bound to contribute equally to his relief, in the event of the insolvency of the principal; and if any of them are insolvent, their shares must be apportioned among those that are solvent. These principles are well settled.

As was said by Miller, J., in a recent case in the New York Court of Appeals, "There seems to be a propriety in the rule that where sureties are called upon to contribute, and some of them are insolvent, that all the parties should be brought into court and a decree made upon equitable principles in reference to the alleged insolvency. There should be a remedy decreed against the insolvent parties which may be enforced if they become afterwards able to pay, and this can only be done in a court of equity, and when they are parties to the action."<sup>1</sup>

On questions of contribution, partners who signed the obligation in the partnership name, are to be regarded as but one surety.<sup>2</sup>

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Preston *v.* Preston and others, 4 Gratt. 88; Wayland *v.* Tucker and others, Id. 267; 1 Story's Eq. Jur. §§ 493, 495; Deering *v.* Earl of Winchelsea, 1 Lead. Cas. Eq. 120.

<sup>1</sup> Easterly *v.* Barber, 66 N. Y. 433, 440.

<sup>2</sup> Chaffee *v.* Jones, 19 Pick. 260.

## CHAPTER XVI.

### RIGHTS OF SURETIES OR GUARANTORS AS AGAINST THEIR PRINCIPAL.

SECTION 1.—Implied promise of indemnity.

- 2.—To what extent the surety is entitled to indemnity.
- 3.—Action to recover money paid for the principal.
- 4.—Right in equity to compel payment by principal.
- 5.—Right to resort to property of the principal for indemnity.
- 6.—Right to set aside fraudulent conveyances made by the principal.
- 7.—Right to require principal to account.

#### SECTION 1.—*Implied promise of indemnity.*

In the absence of an express promise on the part of the principal to indemnify his surety or guarantor, the law will imply a promise of indemnity to prevent injustice.<sup>1</sup>

This implied contract of the principal to indemnify his surety for any payment which the latter may make to the creditor, in consequence of the liability assumed, takes effect from the time when the surety becomes responsible for the debt of the principal, and not from the time when the surety is compelled to pay his principal's debt. It is at the time the surety becomes bound that the law raises the implied promise of indemnity. No new contract is made when the money is paid by the surety, but the payment relates back to the time when the contract was en-

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<sup>1</sup> Holmes v. Weed, 19 Barb. 128; Wilson v. Crawford, 47 Iowa, 469; Kohnitzky v. Meyer, 49 N. Y. 571. There is no relation of co-surety between the guarantor of a note and the sureties of the maker. As to him all are principals; and he may recover against all the makers any sum he has been compelled to pay as guarantor, although, at the time of entering into the contract, he knew part of them were only sureties. Hamilton v. Johnston, 82 Ill. 39.



tered into by which the liability to pay was incurred. The payment only fixes the amount of damages for which the principal is liable, under his original agreement, to indemnify the surety.<sup>1</sup> It is upon this principle that courts of equity set aside conveyances made by the principal debtor in fraud of the rights of the surety, after the surety has become bound, but before he has been compelled to pay his principal's debt.

But no promise of indemnity will be implied where a bond of indemnity has actually been given.<sup>2</sup> But the fact that the surety has received indemnity from a stranger will not waive or merge the implied obligation of the principal. The presumption is that the indemnity so received is cumulative.<sup>3</sup>

SECTION 2.—*To what extent the surety is entitled to indemnity.*

Upon principles of equity, a surety, as between himself and his principal, stands upon a different footing, in some respects, from an ordinary creditor. He is entitled to full indemnity against the consequences of the default of the principal, and is, therefore, entitled to call upon him for reimbursement, not only for what he may have been obliged to pay in discharge of the obligation for

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<sup>1</sup> Rice v. Southgate, 16 Gray, 142; Choteau v. Jones, 11 Ill. 300; Barney v. Grover, 28 Vt. 391. Whether a surety is to be deemed a creditor of the principal from the date of his suretyship, or from the date of his payment of the debt, depends upon the character of the proceeding which raises the question. When payment is made by a surety, a cause of action for reimbursement becomes complete by action in law or in equity, for substitution to the securities held by the original creditors, against which the statute of limitation begins to run from the day of payment. But a surety is a creditor within the statute of frauds from the time of the signing of the obligation by which he is bound. Loughridge v. Bowland, 52 Miss. 546.

<sup>2</sup> Toussaint v. Martinant, 2 Durn. & East, 100.

<sup>3</sup> Wesley Church v. Moore, 10 Penn. St. 273.

which he was surety, but also all reasonable expenses legitimately incurred in consequence of such default, or for his own protection.<sup>1</sup> These do not include expenses incurred in defending himself against the just claim of the creditor,<sup>2</sup> nor remote and consequential damages sustained by him, such as sacrifices of property for the purpose of meeting his liability, loss of time, injury to business, expenses incurred in seeking to avoid payment, and the like.<sup>3</sup> But they do include expenses reasonably incurred for the purpose of securing the application of the property of the principal to the payment of the debt in exoneration of the surety.<sup>4</sup>

Thus, if on the debt becoming due, the surety goes into equity to compel the principal to pay, and the creditor to receive payment, or to compel the creditor to proceed against the principal debtor for the collection of his demand, upon giving security and indemnifying the creditor against delay and expenses, the expenses so incurred are recoverable from the principal.<sup>5</sup> So, if instead of resorting to these proceedings, the surety, by an arrangement with the creditor, gives security for the debt, and receives authority from the creditor to proceed to collect the debt from the principal debtor, he is entitled to recover from his principal the necessary and reasonable

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<sup>1</sup> *Thompson v. Taylor*, 72 N. Y. 32; *Baker v. Martin*, 3 Barb. 634; *Elwood v. Diefendorf*, 5 Barb. 398; *Apgar v. Hiller*, 4 Zab. (N. J.) 812; *Bancroft v. Pearce*, 1 Williams (Vt.), 668; *Downer v. Baxter*, 30 Vt. 467.

<sup>2</sup> *Thompson v. Taylor*, 72 N. Y. 32; *Holmes v. Weed*, 24 Barb. 546. In such case he is only entitled to the costs of a default. *Id.*

<sup>3</sup> *Vance v. Lancaster*, 3 Hey. 130; *Thompson v. Taylor*, 72 N. Y. 32; *Hayden v. Cabot*, 17 Mass. 169; *Wynn v. Brook*, 5 Rawle, 106.

<sup>4</sup> *Thompson v. Taylor*, 72 N. Y. 32. It has been held, in Maine, that where a debt is satisfied by a levy on the property of the surety, the surety cannot recover of his principal the costs of the levy, in the absence of an express agreement for indemnity covering such loss. *Emery v. Vinall*, 26 Me. 295.

<sup>5</sup> *Thompson v. Taylor*, 72 N. Y. 32.

cost and expenses over and above the cost allowed in the judgment.<sup>1</sup>

A statute providing "that any indorser or other surety, and any assignee, executor, administrator, or other trustee, shall be entitled to and allowed to recover from his principal or *cestui que trust* all necessary and reasonable costs and expenses paid or incurred by him, in good faith, as surety or trustee, in the prosecution or defense in good faith of any action by or against any assignee, executor, administrator, or other trustee, as such,"<sup>2</sup> does not abrogate this principle of equity,<sup>3</sup> although, by a proper construction of such statute, the only costs and expenses which a surety can recover under its provisions are those which he has incurred in good faith, in the prosecution or defense of an action by or against himself as such surety.<sup>4</sup>

It is held, in Mississippi, that a surety may recover from his principal legal costs incurred in litigation instituted by the principal, in which the surety was joined, where such costs have been paid by the surety; but that

<sup>1</sup> Thompson v. Taylor, 72 N. Y. 32. It is optional with a surety or accommodation indorser to sue his principal either upon the note, or for the money paid upon it. If he sues upon the note, he can recover no more than the face of the note, with interest; whereas by suing for the money, he becomes entitled not only to the amount of the note and interest, but also to the costs paid by him in the suit upon it. Burton v. Stewart, 62 Barb. 194.

In an earlier case, the same court distinguished between the rights of indorsers and of sureties in respect to the right of action on the principal obligation. The court says: "A surety to a note cannot, after paying it to the holder, maintain a suit at law against the maker *on the same note*. His remedy at law is in an action for money paid. The indorser of commercial paper does not stand in the same relation to the principal debtor that the surety does to his principal. It has been seen that, on payment to the holder, he can maintain an action *upon the paper* against the prior parties." Corey v. White, 3 Barb. 12.

<sup>2</sup> Session Laws of N. Y. 1858, c. 314, § 3.

<sup>3</sup> Thompson v. Taylor, 72 N. Y. 32.

<sup>4</sup> Thompson v. Taylor, 11 Hun, 274.

he cannot recover costs and expenses incurred in litigation by the surety, unless the principal had notice of the litigation, and consented to it, or unless the litigation was undertaken with reasonable prospect of success, and with a view to protect the interests of the principal, or unless the litigation has resulted in benefit to the estate of the principal.<sup>1</sup>

In Nebraska, it was held that a surety, who had paid a judgment recovered against himself and principal, is entitled to recover of his principal whatever he has actually paid to satisfy the judgment, with legal interest, and no more.<sup>2</sup>

If the obligation of the principal debtor was a bond, the surety, on satisfying the bond, is entitled to recover of his principal what he has actually paid to satisfy the same, and no more.<sup>3</sup> If he has extinguished the debt of his principal by the payment of one-half its amount, he can recover only the sum actually paid, and the costs to which he has been subjected.<sup>4</sup> If he has paid the debt of his principal in depreciated currency, he is entitled to recover from his principal only the market value of that currency at the time of payment, with interest thereon and necessary costs.<sup>5</sup> If the payment was made in Confederate money, he is entitled to reimbursement in the

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<sup>1</sup> *Whitworth v. Tillman*, 40 Miss. 76. In North Carolina, it is held that, where the surety is sued with his principal, or where he is sued alone, and notifies his principal, so as to enable him to defend or furnish a defense, the amount recovered against the surety is the measure of his damages against his principal; and that the record of this recovery is conclusive evidence in an action by the surety against his principal, unless there has been fraud or collusion between the surety and creditor, or negligence in using defenses within his power. *Hare v. Grant*, 77 N. C. 203.

<sup>2</sup> *Eaton v. Lambert*, 1 Neb. 339.

<sup>3</sup> *Martindale v. Brock*, 41 Md. 571.

<sup>4</sup> *Bonney v. Seely*, 2 Wend. 481.

<sup>5</sup> *Butler v. Butler*, 8 W. Va. 674; *Jordan v. Adams*, 2 Eng. 348; *Hull v. Creswell*, 12 Gill. & J. 36; *Crozier v. Grayson*, 4 J. J. Marsh, 514.

same kind of funds, with interest from the day of payment.<sup>1</sup>

If the surety has given his own note to the creditor, with security, in lieu of the note of his principal, and has afterwards paid his own note, he is entitled to recover of his principal the rate of interest mentioned in the original note to the time of the payment of his own note.<sup>2</sup> If the surety pays more than the legal rate of interest on the debt of his principal after its maturity and the death of the principal, he cannot recover from the estate of the deceased, or from his personal representatives the excess of interest so paid.<sup>3</sup> And if a surety pays usurious interest, to obtain time to pay the debt of his principal he cannot recover it of the principal;<sup>4</sup> nor can he, as a general rule, on payment of an obligation tainted with usury, knowing it to be so tainted, recover of his principal the amount of usury paid.<sup>5</sup> But, in some cases it has been held, that a surety who signed a note without knowledge that it was given for a usurious consideration, but who paid it with such knowledge, is entitled to recover the full amount paid, unless, before payment, he was notified by the principal not to pay the note.<sup>6</sup> This was so held, for the reason that while the principal might avail himself of the statute

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<sup>1</sup> *Kendrick v. Forney*, 22 Gratt. (Va.), 748. See *Feamster v. Witheron*, 9 W. Va. 296.

<sup>2</sup> *White v. Miller*, 47 Ind. 385.

<sup>3</sup> *Lucking v. Gegg*, 12 Bush. (Ky.) 298.

<sup>4</sup> *Thurston v. Prentiss*, 1 Mann (Mich.), 193.

<sup>5</sup> *Hargraves v. Lewis*, 3 Kelly, 162; *Jones v. Joyner*, 8 Ga. 562; *Whitehead v. Peck*, 1 Kelly (Ga.), 140; *Nims v. McDowell*, 4 Ga. 182. See *Kock v. Block*, 29 Ohio St. 565. It is held, in Vermont, that one who becomes a surety on a note at the request of the principal, and, with him, agrees to pay usurious interest thereon, may, on paying the note, with such interest, after maturity, recover of the principal the money so paid. *Jackson v. Jackson*, 51 Vt. 253; S. C. 31 Am. R. 688.

<sup>6</sup> *Ford v. Keith*, 1 Mass. 139; *Wade v. Green*, 3 Humph. 547.

against usury, he was not obliged to do so, and the surety could not know his intention in that respect, unless he received notice from his principal.

The implied contract between the principal and surety is one for indemnity only, and the surety is not allowed to speculate at the expense of his principal. He is entitled to recover the amount paid, and not the amount extinguished by payment, unless the two amounts are identical.<sup>1</sup> If he pays in land, he is entitled to the value of the land only;<sup>2</sup> and, as has been stated, if he pay in depreciated paper,<sup>3</sup> or less than the full amount,<sup>4</sup> he is entitled to recover of his principal no more than will indemnify him for the money paid.

SECTION 3.—*Action to recover money paid for the principal.*

The law having implied a promise on the part of the principal to indemnify his surety against loss, by reason of having become bound with him, and the right to indemnity relating back to the time when the surety became bound, the surety may, as a general rule, on the default of the principal, without waiting to be sued by the creditor, or without first obtaining leave of his principal, pay the debt to the creditor, and compel reimbursement for the money so paid, by an action at law against the principal.<sup>5</sup>

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<sup>1</sup> Bonney v. Seely, 2 Wend. 481.

<sup>2</sup> Id.

<sup>3</sup> Kendrick v. Forney, 22 Gratt, 748; Miles v. Bacon, 4 J. J. Marsh (Ky.), 457; Butler v. Butler's Admr's. 8 W. Va. 674; Feamster v. Witherow, 9 W. Va. 296.

<sup>4</sup> Pickett v. Bates, 3 La. Ann. 627; Coggeshall v. Ruggles, 62 Ill. 401; Blow v. Maynard, 2 Leigh, 29.

<sup>5</sup> Hazelton v. Valentine, 113 Mass. 470, 479; Wells v. Mann, 45 N. Y. 327; Moore v. Young, 1 Dana, 516, 517; Thomas v. Beekman, 1 B. Mon.

The surety need not wait until the debt matures before discharging it, nor need he wait for the express request of his principal that he make the payment. He may pay the debt of his principal before it matures, and without request, and after the maturity of the obligation in which he is bound, maintain an action against his principal for the moneys so paid.<sup>1</sup> The law implies a request on the part of the principal that his surety pay the debt for which both are bound.<sup>2</sup>

But although the right to indemnity relates back to the time when the surety becomes bound, the right of the surety to maintain an action at law against his principal will not accrue until he has, in some way, discharged all, or a part of the principal's debt,<sup>3</sup> nor until the obligation of the principal has matured, although the debt was paid before maturity.<sup>4</sup>

It is not essential, however, that the surety should pay the entire debt of his principal before bringing his action to recover the amount paid. He may pay parts of the debt at different times, and sue the principal for each part when he pays it.<sup>5</sup> It is not absolutely essential that the payment of the debt should be in money, although, as has been shown, if the payment is in any-

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29; *Partlow v. Lane*, 3 B. Mon. 424; *Baxter v. Moore*, 5 Leigh, 219; *Wesley Church v. Moore*, 10 Barr. 273.

<sup>1</sup> *White v. Miller*, 47 Ind. 385; *Tillotson v. Rose*, 11 Met. 299.

<sup>2</sup> *Hazleton v. Valentine*, 113 Mass. 470.

<sup>3</sup> *Ponder v. Carter*, 12. Ired. 242; *Bonham v. Galloway*, 13 Ill 68; *Ingalls v. Dennett*, 6 Greenl. 79; *Shepard v. Ogden*, 2 Scam. 257; *Pigou v. French*, 1 Wash. (U. S.) 278; *Forest v. Shores*, 11 La. 416; *Stearns v. Irwin*, 62 Ind. 558.

<sup>4</sup> *White v. Miller*, 47 Ind. 385; *Dennison v. Soper*, 33 Iowa, 183; *Tillotson v. Rose*, 11 Metc. (Mass.) 299. The surety may proceed against the principal for indemnity before paying the debt, where the principal is insolvent. *Polk v. Gallant*, 2 Dev. & Bat. Ch. 395.

<sup>5</sup> *Bullock v. Campbell*, 9 Gill. 182; *Williams v. Williams*, 5 Ohio, 444; *Pickett v. Bates*, 3 La. Ann. 627; *Davies v. Humphreys*, 6 Mees. & Wels. 153; *Hall v. Hall*, 10 Humph. 352.

thing but money, the surety can only recover of his principal the actual value of the property parted with, and perhaps interest thereon, and costs.

If he has discharged a judgment rendered against him for the debt of his principal by giving his note secured by a mortgage, he cannot maintain an action at law against his principal, to recover the amount of the note, until he has paid the note or mortgage, or some part thereof.<sup>1</sup> But, if the surety has discharged the joint obligation of himself and principal, by giving his own negotiable paper, which is accepted by his obligee in payment, he may maintain his action against the principal before the payment of the negotiable paper, although he would not have that right if he had discharged the original obligation by giving a bond or other security not negotiable.<sup>2</sup>

If the surety has given his negotiable promissory note in satisfaction of a judgment against himself and principal, and it has been so received by the creditor, it is a payment of the judgment, and the surety may maintain his action against the principal for reimbursement though satisfaction has not been entered of record.<sup>3</sup>

The acceptance by the creditor of the note of a surety, in satisfaction of the demand, is equivalent to actual payment.<sup>4</sup>

But where a surety has been sued, and taken in exe-

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<sup>1</sup> *Bennett v. Buchannan*, 3 Ind. 47. But see *Bone v. Torrey*, 16 Ark. 83. If the note given by the surety be not payable in bank, it must be paid before an action will lie against the principal. *Romine v. Romine*, 59 Ind. 346.

<sup>2</sup> *Boulware v. Robinson*, 8 Texas, 327; *Elwood v. Diefendorf*, 5 Barb. 368. See *Pearson v. Parker*, 3 N. H. 366; *Witherby v. Munn*, 11 Johns. 518.

<sup>3</sup> *Witherby v. Munn*, 11 Johns. 518.

<sup>4</sup> *Howe v. Buffalo, N. Y. & Erie R. R. Co.* 37 N. Y. 297; *Chase v. Hinman*, 8 Wend. 456; *New York State Bank v. Fletcher*, 5 Wend. 85; *Barclay v. Gooch*, 2 Esp. 571; *Clark v. Pinney*, 6 Cow. 297. See *Bennett v. Cook*, 45 N. Y. 268, 279.



cution for the debt of the principal, and is afterwards discharged from imprisonment, under the insolvent act, he cannot maintain an action against the principal debtor, as this does not discharge the debt.<sup>1</sup> He would have a right of action against the principal, however, in case there had been a special promise to save him harmless.<sup>2</sup>

Where there are several sureties, who have each paid their proportionate share of the principal's debt, they have each a several right of action for indemnity;<sup>3</sup> and, where there are two or more principals, the surety may recover, from any one of them, the whole amount which he has been compelled to pay,<sup>4</sup> or, if some of the principals are dead, may recover the amount so paid from the survivor or survivors.<sup>5</sup>

The surety is under no obligation to give notice to his principal that he has paid the debt, or to demand repayment before bringing his suit for the money paid.<sup>6</sup> Upon becoming immediately liable for the debt, he may pay it and commence his action to recover it back,<sup>7</sup> or, as will be seen, he may resort at once to any funds of the principal which he holds as an indemnity, without waiting for the money to be collected by a resort to an action at law.<sup>8</sup> The obligation of the principal to reimburse to a surety the money paid by him, and the right of action growing out of this obligation, are not founded on the undertaking which the surety has entered into for his principal, but on the express contract for indemnity which

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<sup>1</sup> *Powell v. Smith*, 8 Johns. 249.

<sup>2</sup> *Id.*

<sup>3</sup> *Peabody v. Chapman*, 20 N. H. 418.

<sup>4</sup> *Apgar v. Hiler*, 4 Zab. (N. J.) 812.

<sup>5</sup> *Riddle v. Bowman*, 7 Foster (N. H.), 236.

<sup>6</sup> *Sikes v. Quick*, 7 Jones Law (N. C.), 19; *Collins v. Boyd*, 14 Ala. 505; *Odlin v. Greenleaf*, 3 N. H. 270; *Williams v. Williams*, 5 Ham. 444.

<sup>7</sup> *Constant v. Matteson*, 22 Ill. 546; *McKnight v. Bradley*, 10 Rich. Eq. (S. C.) 557.

<sup>8</sup> *Id.*

the parties have made, or on the promise which the law implies upon the payment of money for another at his request.<sup>1</sup> But, in order that the surety may have this right of action, he must, at the time he made the payment, have been legally bound for the debt, and the principal must also, at the same time, have been under legal obligation to pay it.<sup>2</sup> If the surety pays the debt voluntarily after it has become barred by the statute of limitations, he cannot recover the amount paid from his principal.<sup>3</sup> The right of the principal to interpose, in an action for indemnity, brought by his surety, any defense which would have been available to him had the action been brought by the creditor on the original contract, will be considered hereafter.

SECTION 4.—*Right in equity to compel payment by principal.*

As the principal is bound, by every rule of moral and legal obligation, to protect his surety from the payment of the debt for which both are liable, the surety, on the default of his principal to pay the debt at maturity, may at once maintain a suit in equity against him to compel him to pay the debt, and exonerate the surety from liability therefor.<sup>4</sup> The surety has the right to go into equity at

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<sup>1</sup> Hill v. Wright, 23 Ark. 530. See Holmes v. Weed, 19 Barb. 128; Appleton v. Bascom, 3 Met. 169; Tom. v. Goodrich, 2 Johns. 213.

<sup>2</sup> Hollinsbee v. Ritchey, 49 Ind. 261.

<sup>3</sup> Hatchett v. Pegram, 21 La. Ann. 722; Randolph v. Randolph, 3 Rand. 490.

<sup>4</sup> Ritenour v. Mathews, 42 Ind. 7; Irick v. Black, 2 Green (N. J.), 189; Huey v. Pinney, 5 Minn. 310; Croome v. Bivens, 2 Head. (Tenn.) 339; Thompson v. Taylor, 72 N. Y. 32; Hannay v. Pell, 3 E. D. Smith (N. Y.) 432; Antrobus v. Davidson, 3 Mer. 578; Whitridge v. Durkee, 2 Md. Ch. Dec. 442; Ranelagh v. Hayes, 1 Vern. 188; Nesbet v. Smith 2 Bro. C. C. 579, 582; Pride v. Boyce, Rice's Eq. 276, 287; Bishop v. Day, 13 Vt. 81, 88; Hoffman v. Johnson, 1 Bland. 103, 105; Stevenson v. Taverners, 9 Gratt.

any time to compel the principal to exonerate him from liability ;<sup>1</sup> and he need not first make any payment on his principal's debt ;<sup>2</sup> and if a judgment has been recovered against himself and principal, and the principal is insolvent, he may file a bill in equity, before payment, to compel the discharge of the debt out of the estate of the principal, in the hands of third persons.<sup>3</sup>

Under the laws of Arkansas, if an executor, who has converted the assets into money, and chuses in action, and refuses to pay the same over, under the order of the Probate Court, is about to remove from the State without leaving means to indemnify the sureties, they may have him arrested, and restrained from departing the State until he executes a bond, with good security, to indemnify his sureties against liability.<sup>4</sup>

Where a guardian has received money belonging to his ward, and, without returning the amount received, or settling his accounts, has conveyed his property to trustees to secure the payment of other debts, his sureties on the bond may compel him, in equity, to secure them against loss.<sup>5</sup>

Where a guarantor has been sued upon the guaranty, he need not wait for judgment before proceeding against the principal for indemnity.<sup>6</sup>

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398 ; *Rice v. Downings*, 12 B. Mon. 44 ; *Wetzel v. Sponsler*, 6 Harris, 460 ; *Purviance v. Sutherland*, 2 Ohio (N. S.), 478.

<sup>1</sup> *Washington v. Tait*, 3 Humph. 543.

<sup>2</sup> *Stump v. Rogers*, 1 Ham. 533.

<sup>3</sup> *Stump v. Rogers*, 1 Ham. 533 ; *McConnell v. Scott*, 15 Ohio, 401.

<sup>4</sup> *Ruddell v. Childers*, 31 Ark. 571.

<sup>5</sup> *Howell v. Cobb*, 2 Cold. (Tenn.) 104.

<sup>6</sup> *Tankersby v. Anderson*, 4 Desau. 44. A surety in an injunction bond brought a suit in equity, praying that certain horses which his principal was about to take out of the State might be subjected to whatever he should be compelled to pay, and for general relief. Upon it appearing that the principal was taking the horses out of the State to sell, that he intended to return, would leave a large property in the State, and that the surety had not yet

SECTION 5.--*Right to resort to property of the principal for indemnity.*

Where a fund has been assigned in trust for the indemnification of a surety, the surety may come into equity to have the fund applied directly in discharge of the liability, before he has sustained actual damage.<sup>1</sup>

If the principal debtor is insolvent, his surety may retain any funds in his hands belonging to the debtor by way of indemnity against his liability.<sup>2</sup> The right of the surety to this fund will be supported against a *bona fide* assignee for a valuable consideration.<sup>3</sup>

A surety who is liable for the immediate payment of a debt owing by his principal, may pay it at once and resort to any funds of his principal which he holds as an indemnity, without waiting for the money to be collected in an action at law. But, if the principal has given his surety a mortgage to indemnify him against loss, the surety must either have paid the debt or become immediately liable for its payment, before the mortgaged property can be applied. Until then a court of equity will not interfere.<sup>4</sup>

Where money is deposited by a principal with a person who has signed notes with him as surety, under an agreement that the surety shall apply the money in dis-

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incurred any liability,\*the bill was dismissed. *Jennings v. Shropshire*, 9 B. Mon. 431.

<sup>1</sup> *Daniel v. Joyner*, 3 Ired. Ch. 513.

<sup>2</sup> *Abbey v. Van Campen*, 1 Freem. Ch. 273; *Battle v. Hart*, 2 Dev. Ch. 31; *McKnight v. Bradley*, 10 Rich. Eq. S. C. 557.

<sup>3</sup> *Battle v. Hart*, 2 Dev. Ch. 31. A surety for a firm, who is also surety for an individual member of the firm, has no right to apply funds of the firm, received by him, to the satisfaction of the individual debt, without the consent of the other partner; and, if he does so, and afterwards pays the firm debt with his own money, he will be held as having paid it with the partnership funds. *Downing v. Linville*, 3 Bush (Ky.), 472.

<sup>4</sup> *Constant v. Matteson*, 22 Ill. 546.

charge of the notes, the principal cannot afterwards revoke the agreement; the suretyship is sufficient consideration to support it.<sup>1</sup>

If a surety, who has paid the debt of his principal, afterwards becomes the administrator of his principal's estate, he may, while the estate is solvent, apply funds coming into his hands to the discharge of the debt.<sup>2</sup>

The right of a surety to apply the funds in his hands, to the satisfaction of his demand against his principal for money paid for him, may, where there are other sureties for the same debt, become his sole remedy, as a surety who has been fully indemnified by his principal cannot recover contribution from his co-sureties.<sup>3</sup>

Where a person has signed or indorsed a note as surety for several joint principals, and one of the principals has died, the surety may pay the debt and claim a dividend from the estate upon the entire debt, notwithstanding he may hold collateral security for his indemnity. Where the security is merely collateral, a court of equity will not compel its application merely for the purpose of reducing a dividend, unless the debtor stands in the relation of a co-surety.<sup>4</sup>

#### SECTION 6.—*Right to set aside fraudulent conveyances made by the principal.*

A conveyance fraudulently made by a principal, with the view of injuring his surety, will be set aside in equity at the suit of the surety.<sup>5</sup> In this proceeding the holder of the legal title to the lands is a necessary party.<sup>6</sup> But

<sup>1</sup> *Mandigo v. Mandigo*, 26 Mich. 349.

<sup>2</sup> *Bates v. Vary*, 40 Ala. 421.

<sup>3</sup> *Morrison v. Taylor*, 21 Ala. 779.

<sup>4</sup> *West v. Bank of Rutland*, 19 Vt. 403.

<sup>5</sup> *Findlay v. Bank of the United States*, 2 McLean, 44.

<sup>6</sup> *Kimball v. Greig*, 47 Ala. 230.

it seems that the surety, after paying the judgment recovered against himself and principal, does not stand in the position of a simple contract creditor, and cannot, after the death of the principal, join with other creditors in a bill to set aside a conveyance made by the debtor in alleged fraud of creditors.<sup>1</sup>

A debtor has a right to satisfy a debt, without the surety's assent, by a fair conveyance of his property ; and such a conveyance will be sustained by the courts.<sup>2</sup> But where he makes a conveyance of his property which is fraudulent as against his creditor, the surety, on paying a judgment recovered against him and his principal, succeeds to all the rights of the creditor, including the right to set aside the fraudulent conveyance.<sup>3</sup>

Whether a surety is to be deemed a creditor of the principal from the date of his suretyship or from the date of his payment of the debt, depends upon the character of the proceeding which raises the question. A surety is a creditor, within the statute of frauds, from the time he has signed the note, or other obligation, by which he is bound, and may set aside a fraudulent conveyance executed by his principal, after becoming so liable, and before payment of the debt.<sup>4</sup>

Payment by the surety has such a reference back to the original undertaking, that it overrides all intermediate equities, as, for example, the equities of an assignee of a claim against the surety, assigned by the principal before payment.<sup>5</sup>

#### SECTION 7.—*Right to require the principal to account.*

In New York, the surety in the bond of a testamentary trustee, or the legal representative of the surety, may,

<sup>1</sup> *Mugge v. Ewing*, 54 Ill. 236.

<sup>2</sup> *Findlay v. Bank of the United States*, 2 McLean, 44.

<sup>3</sup> See *Martin v. Walker*, 12 Hun, 46.

<sup>4</sup> *Loughridge v. Rowland*, 52 Miss. 546; *Choteau v. Jones*, 11 Ill. 300.

<sup>5</sup> *Barney v. Grover*, 28 Vt. 391.

by a proper petition presented to the surrogate, institute proceedings resulting in an order requiring his principal to render and settle his account.<sup>1</sup> In the same manner the sureties in the official bond of an executor or administrator, or the legal representatives of the surety, may compel their principal to render and settle his account.<sup>2</sup>

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<sup>1</sup> Code Civ. Pro. § 2808.

<sup>2</sup> Code Civ. Pro. § 2726.

## CHAPTER XVII.

### RIGHTS OF SURETIES TO SUBROGATION AND SUBSTITUTION.

SECTION I.—Nature and origin of the right.

2.—When the right exists.

3.—When the right does not exist.

4.—Right to an assignment of a creditor's demand.

5.—Right to securities held by the creditor.

6.—Extent of the right.

SECTION I.—*Nature and origin of the right.*

On the payment of the debt of the principal, the surety does not occupy the position of a mere creditor of the principal, with a bare right of action founded upon an implied contract of indemnity, but he is entitled to the subrogated rights of the creditor, and to succeed to his remedies. The doctrine of subrogation was long known and recognized by the civil law, but was not confined to that system. It was equally a well settled principle of the English law, and though originally of equitable origin, soon became recognized and enforced in courts of law, and ultimately was extended by statute. Said Lord Brougham: "The rule here is undoubted, and founded on the plainest principles of natural reason and justice, that the surety paying off a debt shall stand in the place of the creditor, and have all the rights which he has for the purpose of obtaining his reimbursement. It is scarcely possible to put this right of substitution too high; and the right results more from equity than from contract, or *quasi* contract, unless in so far as the known equity may be supposed to be imported into any transaction, and so to raise a contract by implication."<sup>1</sup>

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<sup>1</sup> *Hodgson v. Shaw*, 3 Myl. & Keene, 183. See *Eaton v. Hasty*, 6 Neb. 419.



In fact, it is universally conceded that the right which the surety acquires, on the payment of the debt, to remedies and securities which the creditor had or held against the principal debtor, is not acquired through the medium of any contract, but rather upon the broader and deeper foundations of natural justice and moral obligation.<sup>1</sup> The right stands upon the same principle upon which one surety is entitled to contribution against another,<sup>2</sup> and extends to securities taken by the creditor without the knowledge of the surety,<sup>3</sup> and may be enforced where no contract or stipulation could be implied between the parties.

In short, although the doctrine of subrogation is most frequently invoked and applied in cases where the person advancing money to pay the debt of a third party, stands in the situation of a surety, or is only secondarily liable for the debt, it is by no means restricted to such cases, but is also applicable to cases where a party is compelled to pay the debt of a third person to protect his own right, or to save his own property;<sup>4</sup> and subrogation may be decreed where no contract or privity of any kind exists between the parties. Whenever one, not a mere volunteer, discharges the debt of another, he is entitled to all the remedies which the creditor possessed against the debtor.<sup>5</sup>

On payment of his principal's debt, the surety may, undoubtedly, stipulate for an assignment and transfer to him of the securities held by the creditor against the principal, or for an assignment and transfer of the debt itself,

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<sup>1</sup> *Mathews v. Aikin*, 1 N. Y. 595. *Craythorne v. Swinburne*, 14 Ves. 159; *Hays v. Ward*, 4 Johns. Ch. 130; *Cottrell's Appeal*, 23 Penn. 294; *Dent v. Wait*, 9 W. Va. 41.

<sup>2</sup> *Hays v. Ward*, 4 Johns. Ch. 130.

<sup>3</sup> *Craythorne v. Swinburne*, 14 Ves. 159.

<sup>4</sup> *Cole v. Malcolm*, 66 N. Y. 363.

<sup>5</sup> *Cottrell's Appeal*, 23 Penn. 294. See *Kyner v. Kyner*, 6 Watts, 221.

or the evidences thereof, and thus add to the rights which the law will give him, the rights acquired by contract. But it is doubtful if the rights so acquired will in fact increase his remedies.

The right of subrogation to the remedies of the creditor on payment of the debt of the principal, is not restricted to the remedies which the creditor had as against the principal; but extends to all the remedies which he had against the principal and others liable for the debt.<sup>1</sup> Nor is the right restricted to the right of the creditor as it exists at the time the surety pays the debt, but is as broad as the right of the creditor at the time of the execution of the contract.<sup>2</sup> Thus, when a surety on appeal pays the judgment against his principal, he is entitled to be subrogated to the rights of the creditor existing at the time he signed the undertaking, and may enforce the judgment against all the property upon which it was then a lien, unless through some act or omission of the creditor such lien has been lost.<sup>3</sup>

A surety on a bond given in and incidental to the prosecution of a suit, is entitled, on paying the debt, to be subrogated to the creditor's remedies only against the person and property of the principal. As to any prior interest he stands in the place of the principal.<sup>4</sup> The surety of an administrator who has paid a debt recovered against his insolvent principal, is subrogated to the rights of the administrator, but not to the rights of the creditor.<sup>5</sup>

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<sup>1</sup> See *Talbot v. Wilkins*, 31 Ark. 411; *Butler v. Birkey*, 13 Ohio, N. S. 514; *McCormick v. Irwin*, 35 Penn. 111; *Horton v. Bond*, 28 Gratt. (Va.) 815, 825; *Lidderdale v. Robinson*, 2 Brock, 159; S. C. 12 Wheat. 594; 1 Lead. Cas. Eq. 170; *Robertson v. Triggs*, 31 Gratt. (Va.).

<sup>2</sup> *Green v. Millbank*, 3 Ab. (N. Y.) New Cas. 138.

<sup>3</sup> *Green v. Millbank*, 3 Abb. (N. Y.) New Cas. 138.

<sup>4</sup> *Bank of Hopkinsville v. Rudy*, 2 Bush (Ky.), 326.

<sup>5</sup> *Clark v. Williams*, 70 N. C. 670. See *Rhame v. Lewis*, 13 Rich. (S. C.) Eq. 269.

The right of subrogation and substitution is in a certain sense assignable. A surety may assign his demand and equitable rights against his principal, and his assignee under such assignment will be clothed with the rights of the surety, and will be substituted to all the rights of the original creditor.<sup>1</sup>

SECTION 2.—*When the right exists.*

It is well settled that a surety, who pays the principal's debt, is entitled to be put in the place of his creditor, and to all the means which the creditor possessed, to enforce payment against the principal debtor.<sup>2</sup>

The surety need not obtain judgment against his principal before filing his bill to be subrogated to the rights of the creditor.<sup>3</sup> A guarantor of a promissory note who has entered into the contract for the accommodation of another, on payment after the default of the principal, will be subrogated to the rights of the holder.<sup>4</sup> For any debt which a person pays, as surety, to a creditor secured by mortgage, the surety is entitled to stand as a subrogated beneficiary.<sup>5</sup>

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<sup>1</sup> York v. Landis, 65 N. C. 535. Sureties of a surety and assignees of a surety, are entitled to all the rights of the surety, and to be substituted in his place as to all his remedies against the principal debtor, or his estate. Elwood v. Diefendorf, 5 Barb. 398; Story's Eq. Jur. § 499.

<sup>2</sup> Lewis v. Palmer, 28 N. Y. 271; Clason v. Morris, 10 Johns. 524; Wilkes v. Harper, 2 Barb. Ch. R. 338; Hinckley v. Krietz, 58 N. Y. 583; 1 Story's Eq. Jur. § 499; Talbot v. Wilkins, 31 Ark. 411; Irick v. Black, 2 Green (N. J.), 189; Butler v. Birkey, 13 Ohio, N. S. 514; Hays v. Ward, 4 Johns. Ch. R. 130; Hodgson v. Shaw, 3 Myl. & Keene, 183; Craythorne v. Swinburne, 14 Ves. 159.

<sup>3</sup> Bittick v. Wilkins, 7 Heisk (Tenn.), 307; Irick v. Black, 2 Green (N. J.) 189.

<sup>4</sup> Babcock v. Blanchard, 86 Ill. 165.

<sup>5</sup> Storms v. Storms, 3 Bush. (Ky.) 77; Jones v. Tincher, 15 Ind. 308.

A mortgage given by the principal to secure both the debt and the surety, will enure to the benefit of the surety on his paying the debt. Fawcetts v. Kimmey, 33 Ala. 261.

Where the collection of a debt, secured by a deed of trust, has been enjoined, a surety in the injunction bond, on payment of the debt, will be substituted in equity to the lien under the trust deed.<sup>1</sup>

A surety who has paid the judgment recovered against his principal, is entitled to be subrogated to the rights and remedies of the judgment creditor,<sup>2</sup> and this right is not affected by the fact that the judgment was entered against the principal and surety jointly,<sup>3</sup> or that the payment was made in ignorance of the right, and without stipulating therefor.<sup>4</sup> Nor will the fact that the surety has attacked the trust assignment of his principal for fraud, estop him from subrogation to the rights of the creditor who has accepted the benefit of the assignment, if the assignment is sustained.<sup>5</sup>

Two of the sureties of a United States collector, who has made default and died insolvent, are entitled to be subrogated to the right of priority of the United States, in the payment of the debt, when they have paid it, as against the estate of another surety who had died before the insolvency of the collector.<sup>6</sup>

### SECTION 3.—*When the right does not exist.*

Subrogation is a mere creature of equity, and will never be allowed to the prejudice of the creditor.<sup>7</sup> As a

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<sup>1</sup> Billings v. Sprague, 49 Ill. 509.

<sup>2</sup> Cottrell's Appeal, 23 Penn. St. 294; Goodyear v. Watson, 14 Barb. 481.

<sup>3</sup> Townsend v. Whitney, 15 Hun, 93.

<sup>4</sup> Dempsey v. Bush, 18 Ohio St. 376.

<sup>5</sup> Motley v. Harris, 1 Lea (Tenn.), 577.

<sup>6</sup> Robertson v. Triggs, 32 Gratt. (Va.) 76. That the surety has a right of substitution against the estate of his principal, where payment of a preferred debt has been made by such surety after the death of the principal, would seem to be settled in Virginia, although the rule seems to be otherwise in England. See Powell's Exrs. v. White, 11 Leigh, 309; Enders v. Brune, 4 Rand. 438. The rule of substitution, for the purpose of enforcing contribution among co-sureties, is not different.

<sup>7</sup> Harlan v. Sweeney, 1 Lea (Tenn.), 682. Equity will never displace the

general rule, a surety is not entitled to subrogation until he pays the debt in full.<sup>1</sup> If he pays all or a part of a judgment against his principal, and the principal pays the rest, the surety will be subrogated to all the benefits and privileges which the creditor had, by means of his judgment, against his principal.<sup>2</sup> But if any part of the judgment remains unpaid, the surety will not be entitled to be subrogated to the benefits which the creditor had, as the debt of the principal is not satisfied,<sup>3</sup> unless it be in a case where the surety was bound for a part of the debt only.<sup>4</sup>

Relief is extended to the surety by substituting him in the place of the creditor, only upon the assumption that the creditor has obtained, or is to obtain, full satisfaction of his claim, and that his further detention of

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creditor to his prejudice, merely to give the surety a better footing. *Grubbs v. Wisors*, 32 Gratt. (Va.) 127. In this case, G. sold a tract of land to W., Jr., the purchase money to be paid in three equal annual installments, and G. retaining the title until the whole was paid. For the first installment W., Jr., executed a negotiable note with W., Sr., as surety, payable at one year, and he gave his own notes at two and three years for the rest of the purchase money. G. assigned the note for the first payment to M., and M. assigned it to H., and it was paid after maturity and protest by W., Sr., the surety. On a bill filed by W., Sr., to be subrogated to the lien rights of G., and to be paid out of the proceeds of the sale of the land before the two bonds given for the second and third installments held by G. were paid. *Held*, that while the assignment of the note for the first payment by G. carried with it to his assignee so much of the lien of the land as was necessary to secure the same, and, as between G. and the assignee, gave the latter a prior lien, these equities of the parties *inter esse* are not available to the surety, W., Sr., by subrogation, in a case like this, where the rights of G., the creditor, would be impaired thereby, and therefore the lien of W., Sr., the surety, must be postponed to that of G., the vendor. See 21 Alb. L. J. 517.

<sup>1</sup> *Harlan v. Sweeny*, 1 Lea (Tenn.), 682; *New Jersey, &c. R. R. Co. v. Wortendyke*, 27 N. J. Eq. 658.

<sup>2</sup> *Hess' Estate*, 69 Penn. St. 272.

<sup>3</sup> *Hess' Estate*, 69 Penn. St. 272; *Field v. Hamilton*, 45 Vt. 35; *Magee v. Leggett*, 48 Miss. 139; *Gannett v. Blodgett*, 39 N. H. 150; *Kyner v. Kyner*, 6 Watts, 221.

<sup>4</sup> *Allison v. Sutherlin*, 50 Mo. 274.

securities for the debt is against equity and good conscience.<sup>1</sup>

A party's rights must be fully satisfied before another can be substituted to his security; and the courts will decline to interfere with his security while any part of his debt remains unpaid.<sup>2</sup> If a surety, who has paid the judgment against himself and principal, has been defeated in an action to recover of his principal the amount so paid, he will not be substituted to the rights of the plaintiff in the original action.<sup>3</sup>

The right of subrogation resting on principles of pure equity, will not be allowed to a party indebted to the judgment debtor, against whom he asks to be substituted, until he has first satisfied the debt.<sup>4</sup>

The surety, on being subrogated to the rights of the creditor, takes such rights as the creditor had, and no other or greater;<sup>5</sup> and, in order that the surety shall succeed to these rights, it must be shown that, at the time he paid the debt, the creditor had a valid and subsisting lien or equity, such as a court of equity would have enforced at his instance for the satisfaction of the debt.<sup>6</sup> If a vendor, having a lien upon land for the purchase money, obtains judgment against the purchaser and his surety, on a note given for such purchase money, issues an execution, levies it on the purchaser's equitable estate, sells the same under the execution, and the surety becomes

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<sup>1</sup> *Union Bank of Maryland v. Edwards*, 1 Gill. & J. 346.

<sup>2</sup> *Kyner v. Kyner*, 6 Watts, 221; *Delancy v. Tipton*, 3 Hey. 14; *Hoover v. Epler*, 52 Penn. St. 522; *Glass v. Pullen*, 6 Bush. 346; *Neptune Ins. Co. v. Dorsey*, 3 Md. Ch. Dec. 334.

<sup>3</sup> *Fink v. Mahoffy*, 8 Watts, 384.

<sup>4</sup> *Coates' Appeal*, 7 Watts & Serg. 99.

<sup>5</sup> *Bibb v. Martin*, 14 S. & M. 87; *Bush v. Stamps*, 26 Miss. 463; *Houston v. Branch Bank*, 25 Ala. 250. A surety who pays after the return unsatisfied of an execution against his principal, cannot enforce his rights acquired by substitution. *Smith v. Harrison*, 33 Ala. 706.

<sup>6</sup> *Havens v. Foudry*, 4 Mett. (Ky.) 247.

the purchaser, the vendor's lien is thereby extinguished, and the surety buys, like any other purchaser, subject to any outstanding judgment or lien existing against the original purchaser. The extinguishment of the vendor's lien entirely excludes the surety's right of subrogation.<sup>1</sup>

If an administrator pays, as surety, a part of the purchase money of land bought by his intestate, he is not entitled to be subrogated to the vendor's lien upon the land.<sup>2</sup> A person who loans money to another, to enable the borrower to pay a debt for which the lender was in no way bound, is not entitled to subrogation to the rights of the creditor whose debt was thus paid.<sup>3</sup> To entitle one paying the debt of another to be subrogated to the rights of the creditor, the payment must have been made at the debtor's instance, or the person making the payment must be liable, as surety or otherwise, for the payment of the debt.<sup>4</sup>

A surety of a surety, though compelled to pay the creditor, is not entitled to be substituted in the place of such creditor for the purpose of enforcing the payment against the principal debtor, if such debtor has paid his immediate surety.<sup>5</sup>

A stranger paying the debt of another, will not be

<sup>1</sup> *Hall v. Jones*, 21 Md. 439. A vendor's lien on land is not extinguished by renewing the notes for the unpaid balance of the purchase money with personal security before he has conveyed the land. *Lusk v. Hopper*, 3 Bush. 179.

<sup>2</sup> *McNiell's Adm'r v. McNiell's Creditors*, 36 Ala. 109.

<sup>3</sup> *Downer v. Miller*, 15 Wis. 612. See *Griffen v. Proctor*, 14 Bush. 571.

<sup>4</sup> *Wilson v. Brown*, 2 Beasley (N. J.), 277; *Richmond v. Marston*, 15 Ind. 134. A singular exception to the above rule is to be found in a North Carolina case. A person believing himself to be a surety on an administrator's bond, settled with the next of kin, who were under the like impression. The administrator became insolvent. It was held that, on its appearing that the person who had settled with the next of kin was not a surety, he had an equity to be subrogated to the rights of the next of kin against the real sureties in the bond. *Capehart v. M'Avon*, 5 Jones Eq. (N. C.) 178.

<sup>5</sup> *New York State Bank v. Fletcher*, 5 Wend. 85.

substituted to the creditor's rights in the absence of an express agreement.<sup>1</sup> A surety in a replevin bond, who has not paid the debt, has no right of subrogation.<sup>2</sup>

So, the sureties of a purchaser at an executor's sale have no right of substitution to the rights of the executor, whereby they can have the statutory mortgage in his favor enforced in equity against the property for their benefit, until they have paid or secured the debt.<sup>3</sup>

A surety for a judgment debtor, who becomes so for the purpose of staying execution, is not entitled to be substituted in place of the plaintiff on payment of the judgment, and to have priority to subsequent creditors;<sup>4</sup> and a person who, by becoming surety in a replevin bond, has prevented the sale of the debtor's property, ought not to be substituted to the lien of the creditor, so as to overreach a junior lien created before the surety became liable.<sup>5</sup> If a surety, after paying a judgment against himself and his principal, is defeated in an action to recover of the principal the amount paid, he cannot be substituted to the rights of the plaintiff in the original action.<sup>6</sup>

#### SECTION 4.—*Right to an assignment of the creditor's demand.*

The law seems to have been settled in England that though a surety, on paying the debt of his principal, became entitled to the full value of all collateral securities which the creditor had taken and held as additional secu-

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<sup>1</sup> *Richmond v. Marston*, 15 Ind. 134. See *Webster's Appeal*, 86 Penn. St. 409.

<sup>2</sup> *Glass v. Pullen*, 6 Bush (Ky.), 346.

<sup>3</sup> *Lee v. Griffin*, 31 Miss. 632.

<sup>4</sup> *Armstrong's Appeal*, 7 Watts & Serg. 99, *Lathrop & Dale's Appeals*, 1 Barr. 512.

<sup>5</sup> *Fishback v. Bodman* 14 Bush. (Ky.) 117.

<sup>6</sup> *Fink v. Mahaffy*, 8 Wats. 384.



urity for his debt, and to an assignment of such collaterals, if any such assignment should be necessary or convenient to give the surety such full benefit, yet he was not entitled to, and could not compel an assignment of the debt itself, or of the instrument by which it was evidenced.<sup>1</sup> Thus, if the principal, with his surety, enter into a bond for the payment of the debt, and the principal also executes a mortgage to the creditor, as additional security for the debt, under the English decisions, the surety, on payment of the debt, would be entitled to an assignment of the mortgage, but not to an assignment of the bond.

By a recent act of Parliament, it is provided that, "Every person, who, being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt, or perform such duty, shall be entitled to have assigned to him, or to a trustee for him, every judgment, specialty, or other security, which shall be held by the creditor in respect to such debt or duty, whether such judgment, specialty, or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or the performance of the duty, and such person shall be entitled to stand in the place of the creditor in any action or other proceeding at law or in equity, in order to obtain from the principal debtor, or any co-surety, co-contractor, or co-debtor, as the case may be, indemnification for the advances made and losses sustained by the person who shall have so paid such debt or performed such duty; and such payment or performance so made by such surety shall not be pleadable in bar of any such action or other proceeding by him; provided

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<sup>1</sup> Ellsworth *v.* Lockwood, 42 N. Y. 89; Copes *v.* Middleton, 1 Turn. & Russ. 224, 231; Hodgson *v.* Shaw, 3 Myl. & Keene, 190, 192; Craythorne *v.* Swinburne, 14 Ves. 159.

always, that no co-surety, co-contractor, or co-debtor, shall be entitled to recover from any other co-surety, co-contractor, or co-debtor, by the means aforesaid, more than the just proportion to which, as between those parties themselves, such last-mentioned person shall be justly liable.<sup>1</sup>

In New York, and some of the other States, the surety, on payment of the debt against his principal, is entitled to an assignment or effectual transfer of the debt, and of the bond or other instrument evidencing the debt, as well as of the additional collaterals taken and held by the creditor as security for the debt.<sup>2</sup>

There has been considerable diversity of opinion among the judges as to whether the payment of a judgment rendered against the principal for the debt, extinguishes the judgment, so as to cut off the right of the surety to subrogation to the judgment. In some of the States it is held that the payment of the judgment extinguishes it, and cuts off the surety from the right of subrogation to the rights of the creditor under the judgment.<sup>3</sup> In Kentucky, a surety is entitled, by statute, on paying the judgment, to demand an assignment thereof from the plaintiff, and to compel the assignment if the plaintiff refuses to make it.<sup>4</sup> And in many of the States it is held that the payment of a judgment by the surety, with the intent to avail himself of the right of subrogation, will

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<sup>1</sup> Mercantile Law Amendment Act, 19 & 20 Vict. Ch. 97 § 5.

<sup>2</sup> *Ellsworth v. Lockwood*, 42 N. Y. 89; *Speiglemyer v. Crawford*, 6 Paige, 257; *King v. Baldwin*, 2 Johns. Ch. 554; *Hays v. Ward*, 4 Johns. Ch. 123; *New York State Bank v. Fletcher*, 5 Wend. 85; *Matthews v. Aiken*, 1 N. Y. 595; *Hinckley v. Kreitz*, 58 N. Y. 583, 591; *Towe v. Newbold*, 4 Jones Eq. (N. C.) 212; *Hannner v. Douglass*, Id. 262; *McDougald v. Dougherty*, 14 Ga. 674.

<sup>3</sup> *Dennis v. Rider*, 2 M'Lean, 451; *Foster v. Trustees &c.* 3 Ala. 430; *Holmes v. Day*, 108 Mass. 563; *McLean v. Lafayette Bank*, 3 M'Lean, 587; *Carr v. Glasscock*, 3 Gratt. 343.

<sup>4</sup> *Veach v. Wickersham*, 11 Bush. (Ky.) 261.

not operate in equity to annihilate the debt, but that a court of equity will keep the debt alive and enforce the right of subrogation for the benefit of the surety.<sup>1</sup> In the absence of proof to the contrary, the court will presume that the surety paid the judgment with intent to keep it alive and enforce his right of subrogation ;<sup>2</sup> and the right of the surety will not be affected by the fact that he paid the debt in ignorance of the right, and without any stipulation therefor.<sup>3</sup>

Where judgments have been obtained against the principal and surety, and a third person has interposed and given his note for the debt, to obtain a stay of execution against the principal, and the surety is afterwards obliged to pay the debt, he is entitled to have an assignment of the judgment, on the note of the third person, to indemnify him for such payment.<sup>4</sup>

In Pennsylvania, under a statute authorizing a stay of execution for a year, upon giving security, it has been repeatedly held, that the surety for the original debt, upon payment, is entitled to the remedy of the creditor against the surety upon the stay.<sup>5</sup>

And so, where a principal in a bond is sued, arrested, and gives bail, and the sureties in the original bond have been sued and have paid the judgment, they are entitled to have the judgment against the bail assigned to them to reimburse them what they have paid.<sup>6</sup>

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<sup>1</sup> *Smith v. Rumsey*, 33 Mich. 183 ; *Baily v. Brownfield*, 20 Penn. 41 ; *Lumpkin v. Mills*, 4 Ga. 343 ; *Mitchell v. DeWitt*, 25 Texas, 180 ; *Hammer v. Douglass*, 4 Jones Eq. (N. C.) 262 ; *McDougald v. Dougherty*, 14 Ga. 674.

<sup>2</sup> *Neilson v. Fry*, 16 Ohio St. 553 ; *Eddy v. Traver*, 6 Paige, 521 ; *Richter v. Cummings*, 60 Penn. St. 441 ; *Hill v. Manser*, 11 Gratt. 522.

<sup>3</sup> *Dempsey v. Bush*, 18 Ohio, St. 376.

<sup>4</sup> *Pott v. Nathans*, 1 Watts & Serg. 155.

<sup>5</sup> *Burns v. Huntington Bank*, 1 Penn. 395 ; *Pott v. Nathans*, 1 W. & S. 155 ; *Schnitzel's Appeal*, 49 Penn. St. 23.

<sup>6</sup> *Parsons v. Briddock*, 2 Vern. 608.

So, the sureties in an undertaking given upon an appeal from the special to the general term of the Common Pleas, may, on the affirmance of the judgment by the general term, pay the same as sureties, and be substituted to the rights of the plaintiff in the judgments, and enforce the same against the defendant therein ; and in case the defendant should further prosecute his appeal and give the undertaking required on appeal to the Court of Appeals, such undertaking would necessarily enure to the benefit of the sureties paying the judgments as the equitable owners of the same, and upon affirmance in the Court of Appeals could enforce it against the second sureties.<sup>1</sup>

And, generally, a surety is entitled, on payment of his principal's debt, to be subrogated to the rights of the creditor as against all subsequent sureties.<sup>2</sup>

If the principal only appeals from a judgment against himself and a surety, and the latter is obliged to pay the debt, he is entitled to have the judgment of affirmance against the principal assigned to him, and to recover against the sureties on the principal's supersedeas bond.<sup>3</sup>

#### SECTION 5.—*Right to securities held by the creditor.*

A surety in a note or other obligation who pays and discharges the same, is entitled to the benefit of all the securities which have been taken by the creditor from the principal.<sup>4</sup> A mortgage given to secure the debt, and

<sup>1</sup> *Hinckley v. Kreitz*, 58 N. Y. 583. And see *Barnes v. Mott*, 64 N. Y. 397.

<sup>2</sup> *Parsons v. Briddock*, 2 Vern. 608; *Barnes v. Mott*, 64 N. Y. 397, 403; *McCormick v. Irwin*, 35 Penn. St. 111.

<sup>3</sup> *Mitchell v. De Witt*, 25 Texas (Sup.), 180.

<sup>4</sup> *York v. L'ndis*, 65 N. C. 535; *Butler v. Birkey*, 13 Ohio, N. S. 514; *Henry v. Compton*, 2 Head (Tenn.), 549; *Dozier v. Lewis*, 27 Miss. 679; *Jones v. Tincher*, 15 Ind. 308; *Fawcett v. Kimmey*, 33 Ala. 261; *Craythorne v. Swinburne*, 14 Ves. 159; *Hay v. Ward*, 4 Johns. Ch. 130; *Mathews v.*

also, the surety will enure to the benefit of the surety on the payment by him of the debt.<sup>1</sup> The surety, when he pays the debt, may stipulate for the assignment of the collateral securities held by the creditor, and the debt will be deemed unpaid so far as is necessary to support these securities.<sup>2</sup> An attachment is deemed a collateral security, and an assignment of the action will entitle the surety to prosecute the same, and to levy the execution recovered for his own benefit.<sup>3</sup>

So jealously does the law guard the right of the surety to be subrogated to the securities held by the creditor for his security, that any act of the creditor by which the securities are lost, released, or discharged, or by which the right of subrogation thereto is impaired or diminished will, to the extent of the securities so lost or discharged, release the liability of the surety.<sup>4</sup>

Where a surety has paid a note secured by a mortgage on lands of the principal, and the creditor has entered a satisfaction of the mortgage, so as to leave the land subject to the lien of a judgment held by him against the principal, under which he has levied on the land, the surety is entitled, in equity, to the benefit of the mortgage security to the extent of his payment, and if the land has been sold under a prior mortgage, he is entitled to the surplus.<sup>5</sup>

When, on application of the sureties of a guardian, he

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Aikin, 1 N. Y. 595; Colvin<sup>\*</sup> v. Owens, 22 Ala. 782; New Hampshire Savings Bank v. Colcord, 15 N. H. 119; Dennis v. Rider, 2 McLean, 451; Stamford Bank v. Benedict, 15 Conn. 437; Arnot v. Woodburn, 35 Mo. 99; Sears v. Laforce, 17 Iowa, 473; Muller v. Wadlington, 5 S. C. 342; Price v. Trusdell, 28 N. J. Eq. 200.

<sup>1</sup> Fawcetts v. Kimmey, 33 Ala. 261.

<sup>2</sup> Brewer v. Franklin Mills, 42 N. H. 292.

<sup>3</sup> Id.; Edgerly v. Emerson, 3 Foster (N. H.), 555.

<sup>4</sup> Denny v. Lyon, 38 Penn. St. 98; Barrow v. Shields, 13 La. Ann. 57; Springer v. Toothaker, 43 Me. 381; La Farge v. Herter, 11 Barb. 159.

<sup>5</sup> City Nat. Bank of Ottawa v. Dudgeon, 65 Ill. 111.

is required to give further security, in the form of a second bond, with other sureties, the sureties on both bonds are bound for the faithful performance of the duties of their common principal, and if the sureties in the first bond are compelled to pay the whole amount of their principal's deficiency, they will be subrogated in equity to the rights of the ward, so far as to allow them the use of the second bond to enforce contribution.<sup>1</sup>

SECTION 6.—*Extent of the right.*

It is well settled doctrine, that when a surety pays the debt of his principal, for which he was liable, he becomes, on such payment, entitled, not only to the benefit of all collateral securities, both legal and equitable, held by the creditor as an additional assurance of payment; but where there are two or more persons sustaining the relation of surety, and one of them has received and holds from the principal securities for his indemnity, and the other surety pays the debt, the paying surety becomes entitled to all the securities for his indemnity so held by his co-surety.<sup>2</sup>

Where the lessor of land has taken the notes of the lessee, with personal security for payment of the rent, and has also reserved in the lease the right to distrain, the surety, on being compelled to pay the notes, will be subrogated to all the landlord's rights against the lessee, including the right to distrain.<sup>3</sup> •

The extent to which the right of subrogation will be carried, will generally be measured by the necessities of the case, and will be limited to the protection of the surety when its further extension would result to the

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<sup>1</sup> Commonwealth v. Cox, 36 Penn. St. 442.

<sup>2</sup> Butler v. Birkey, 13 Ohio, N. S. 514.

<sup>3</sup> Hall v. Hoxsie, 84 Ill. 616.

prejudice of the public at large.<sup>1</sup> It will not be allowed, except in a clear case, and where it works no injustice to the rights of others.<sup>2</sup> It will not be extended so far as to entitle a surety, in a note given by a captain of a boat for supplies furnished, to the lien accorded by statute to one who furnishes such supplies.<sup>3</sup> Nor will the surety on a bond given to release a vessel from attachment in admiralty, and who has been compelled to pay the whole amount decreed against his principal, be entitled to a lien upon the vessel, though he will be entitled to all the rights of the libellants against the principal.<sup>4</sup>

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<sup>1</sup> *Re Hewit*, 25 N. J. Eq. 210.

<sup>2</sup> *Lloyd v. Galbraith*, 32 Penn. St. 103.

<sup>3</sup> *Hays v. Steamboat Columbus*, 23 Mo. 232.

<sup>4</sup> *The T. P. Leathers*, 1 Newb. Adm. 432.

## CHAPTER XVIII.

### RIGHTS OF CREDITORS.

SECTION 1.—Right to proceed against principal or surety, or both.

2.—Right to securities held by a surety.

3.—Rights as to the application of payments.

4.—Rights in the marshalling of assets.

SECTION 1.—*Right to proceed against principal or surety, or both.*

As a surety is bound, with his principal, as a co-obligor, in the contract entered into with the creditor, the latter has an undoubted right to enforce the contract against either or both, at his election,<sup>1</sup> subject only to the equitable right of the surety to compel the creditor to satisfy his demand out of any funds of the principal placed in the hands of the creditor, as security for the debt. In cases of guaranties of collection, the creditor must proceed against the principal to enforce his demand, before proceeding against the guarantor, or excuse the omission of such prior proceedings by showing that they would have been unavailing;<sup>2</sup> and, in all cases of guaranty, the creditor must elect whether he will proceed against the principal or guarantor, as he cannot join both in the same action.<sup>3</sup>

If the creditor holds a note signed by a surety, and

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<sup>1</sup> See *Muscatine v. Mississippi, &c. R. R. Co.* 1 Dill. 536; *Garey v. Hignutt*, 32 Md. 552; *McMillan v. Bull's Head Bank*, 32 Ind. 11; S. C. 2 Am. R. 323. And see *ante*, p. 18, 186.

<sup>2</sup> See *ante*, p. 4.

<sup>3</sup> *McMillan v. Bull's Head Bank*, 32 Ind. 11; *Harris v. Eldridge*, 5 Abb. New Cas. 278. See *Barton v. Speis*, 5 Hun, 60.



secured by a mortgage, he may proceed to judgment against both principal and surety, without first exhausting the mortgage security.<sup>1</sup> A creditor cannot be compelled to exhaust his several remedies against various co-sureties in an official bond, for the recovery of their equitable proportion of the entire debt, before calling on any one of them for the payment of the whole, where he has no security for the debt but their joint and several bond; and he may prosecute his suit against surviving sureties, without reviving the proceedings against the representatives of a deceased co-surety.<sup>2</sup>

SECTION 2.—*Right to securities held by surety.*

It is a settled rule in equity, that the creditor shall have the benefit of any counter bonds or collateral securities which the principal debtor has given to the surety, or person standing in the position of a surety, for his indemnity. Such securities are regarded as trusts for the better security of the debt, and equity will compel the execution of the trusts for the benefit of the creditor.<sup>3</sup>

Thus, when two persons bear to each other the relation of principal and surety, and to a third person that of joint debtors, and the estate of the surety is discharged from liability for the debt by his decease, a judgment confessed by the principal to the surety is a *quasi* trust for the payment of the debt, and remains a valid lien and security for the full amount of the creditor's claim.<sup>4</sup>

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<sup>1</sup> Jones v. Tincher, 15 Ind. 308.

<sup>2</sup> Lowndes v. Pinckney, 2 Strobb. Eq. 44.

<sup>3</sup> Owens v. Miller, 29 Md. 144; Van Orden v. Durham, 35 Cal. 136; Vail v. Foster, 4 N. Y. 312; Maure v. Harrison, 1 Eq. Cas. Ab. 93, K. 5; Curtis v. Tyler, 9 Paige, 432; Wright v. Morley, 11 Ves. 22; Bank of Auburn v. Throop, 18 Johns. 505; Crosby v. Crafts, 5 Hun, 327; Rice's Appeal, 79 Penn. St. 168; Ohio Life Ins. Co. v. Ledyard, 8 Ala. 866; Roberts v. Colvin, 3 Gratt. 358; Martin v. Campbell, 29 Barb. 188; Vail v. Foster, 4 N. Y. 312; Price v. Trusdell, 28 N. J. Eq. 200.

<sup>4</sup> Crosby v. Crafts, 5 Hun, 327.

The right of the creditor to the benefit of the collaterals held by the surety for his indemnity, is not affected by the fact that the creditor was ignorant of their existence at the time of entering into the contract, and did not give the credit on the faith of the securities.<sup>1</sup>

But before the creditor can appropriate to his debt the collateral indemnity of the surety, it must appear that the security is for the debt, as well as the ultimate protection of the surety. When this appears, it is immaterial whether it was given at the time the principal obligation was incurred or afterwards, or whether it was known at the time to the creditor or not. The creditor has an interest in it, and becomes a *cestui que trust*. The fund or property at once takes on a trust character, and the surety can do no act which will discharge the trust, or release the property from the burden to the prejudice of the creditor.<sup>2</sup>

To give a creditor the right to be substituted in the place of the surety of the debtor, the relation of debtor and creditor must exist between the creditor and the surety; and the claim on the surety must be valid, binding and capable of immediate enforcement.<sup>3</sup> Where the relation of debtor and creditor has never existed between the parties, or where, having once existed, the relation has ceased, there can be no substitution of the creditor to the rights of the surety.<sup>4</sup>

It is not necessary that a creditor should reduce his debt to a judgment, in order to entitle him to subrogation to the rights of a surety under a mortgage given by the debtor.<sup>5</sup> On the application of the creditor to be

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<sup>1</sup> Rice's Appeal, 79 Penn. St. 168; Kramer's Appeal, 37 Penn. St. 71.

<sup>2</sup> Osborn v. Noble, 46 Miss. 449.

<sup>3</sup> Constant v. Matteson, 22 Ill. 546.

<sup>4</sup> Constant v. Matteson, 22 Ill. 546.

<sup>5</sup> Saffold v. Wade, 51 Ala. 214.

subrogated to the rights of the surety, the fund or property pledged to indemnify the surety will be directly appropriated by a court of equity to the payment of the debt for which the surety is liable, in case the surety has the immediate right to satisfy the debt, and resort to the indemnity in his hands.<sup>1</sup>

The creditor, on being substituted to the place of the surety, possesses no greater or higher right than that possessed by the surety to whose right he succeeds, and the extent of that right must be determined by the instrument which creates it.<sup>2</sup>

### SECTION 3.—*Rights as to application of payments.*

Judge Story says: "If the creditor has a right in any case, to elect to what debt to appropriate an indefinite payment, it seems proper that he should have it only when it is utterly indifferent to the debtor to which it is applied, and then, perhaps, his consent that the creditor may apply it as he pleases may fairly be presumed."<sup>3</sup> If a creditor, having several claims against his debtor, receives a portion of the entire amount in a judicial proceeding founded upon them all, the law will apply such money as a payment ratably upon all the claims. The creditor has no right to apply it to the satisfaction of some of the demands to the entire exclusion of others.<sup>4</sup>

Pottier lays down the rule that "the application ought to be made to the debt for which the debtor has given sureties, rather than to them he owes singly."<sup>5</sup> In case there are numerous persons standing in the position of sureties for the same principal, and the creditor holds the

<sup>1</sup> Constant v. Matteson, 22 Ill. 546.

<sup>2</sup> Bush v. Stamps, 26 Miss. 463.

<sup>3</sup> Story's Eq. Jur. § 459*d*.

<sup>4</sup> Cowperthwaite v. Sheffield, 1 Sandf. (N. Y.) 416; S. C. 3 N. Y. 243.

<sup>5</sup> Story's Eq. Jur. § 459*c*, note 3; Marryatts v. White, 2 Starkie, 101.

avails of security given him by the debtor for all his obligations, all the sureties are entitled to share ratably in this fund.<sup>1</sup>

A person indebted on several accounts, may apply a payment to which demand he pleases; if he fails to do so, the right devolves on the creditor,<sup>2</sup> and if the creditor makes no specific application at the time, he may make such application at any time afterwards, as he chooses, if it is a matter of indifference to the debtor on which of several distinct matters of account it is applied.<sup>3</sup> If neither party make any application of a general payment upon a general account the law will, as a general rule, apply it to the oldest items.<sup>4</sup> Where there is a general payment

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<sup>1</sup> *Bridenbecker v. Lowell*, 32 Barb. 9.

<sup>2</sup> *Baker v. Stackpole*, 9 Cow. 420; *Pattison v. Hull*, 9 Cow. 747; *Pickering v. Day*, 2 Del. Ch. 333; *Whitaker v. Groover*, 54 Ga. 174; *Harding v. Tift*, 75 N. Y. 461; *Jones v. Williams*, 39 Wis. 300; *Bean v. Brown*, 54 N. H. 395; *Champenoes v. Fort*, 45 Wis. 355; *Leef v. Goodwin*, Taney, 460; *Solomon v. Dreshler*, 4 Min. 278.

<sup>3</sup> *Allen v. Culver*, 3 Denio, 284; *Sheppard v. Steele*, 43 N. Y. 52; *Haynes v. White*, 14 Cal. 446.

<sup>4</sup> *Sheppard v. Steele*, 43 N. Y. 52; *Webb v. Dickinson*, 11 Wend. 62; *Pickering v. Day*, 2 Del. Ch. 333; *Genin v. Ingersoll*, 11 W. Va. 549; *Killoren v. Bacon*, 57 Ga. 497; *Allen v. Brown*, 39 Iowa, 330; *St. Albans v. Failey*, 46 Vt. 448; *Sprague v. Hazenwinkle*, 53 Ill. 419.

But this rule is not universal. If the court can see that the parties intended otherwise, it will give effect to such intention. Thus, if there are separate demands, part of which are secured and part not secured, the application will be made on those not secured. *Langdon v. Bowen*, 46 Vt. 512; *Lash v. Edgerton*, 13 Minn. 210.

If the application of the payments according to the general rule will operate unjustly as between the parties, the court will make such application as justice and equity requires. *Campbell v. Vedder*, 3 Keys, 174.

When credits accrue, not by voluntary payment, but by operation of the dealings of the parties, against charges in account, the charges are extinguished by operation of law in order of time irrespective of any question of security for some of the items. No question of intention as to the application of payments arises in such a case. *Moore v. Gray*, 22 La. Ann. 289.

The court may make the application to the most precarious security or to the oldest debt. *King v. Andrews*, 30 Ind. 429; *Nuttall v. Brannin*, 5 Bush. (Ky.) 11; *McDaniel v. Barnes*, 5 Bush. 183. Equity will generally apply the

made by the debtor, and there are several distinct causes of indebtedness, and no application of the payment is made by either party at the time, and it is a matter of indifference to the debtor to which indebtedness the payment is applied, the creditor has a reasonable time in which to elect as to which indebtedness he will apply the payment. He is not required to immediately designate the debt to which he will apply the payment.<sup>1</sup> But the general payment must be applied to a debt then due; it cannot be afterwards applied to a debt becoming due after the payment.<sup>2</sup>

Where no specific application has been made by the parties of payments upon a running account, they will be applied in equity upon the first items of indebtedness, although the creditor may hold security for the payment of these items and none for the balance.<sup>3</sup>

An agreement between the parties, or the expression of the wish, by the debtor, before the time of making the payment as to its application, involves a direction by him,

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payment to those debts for which the security is most precarious. *Field v. Holland*, 6 Cranch, 8; *Gordon v. Hobart*, 2 Story, 243; *Chester v. Wheelright*, 15 Conn. 562; *Bosley v. Porter*, 4 J. J. Marsh. 621; *Burks v. Albert*, 4 J. J. Marsh. 97; *Pattison v. Hull*, 9 Cow. 747. It is well said that where neither party make an application of the payment there is no settled rule for making the application, but the payment will be applied according to the justice of each particular case under the circumstances. *Smith v. Loyd*, 11 Leigh, 512. The court will make such application as will do the greatest equity, or will carry out the mutual intention of the parties at the time of payment, if that can be ascertained; and the result of this principle will be that in some instances payments will be applied to the oldest demands, and sometimes to the most precarious ones, but never to a debt not due when the payment was made, if there was another debt due at that time. *Stamford Bank v. Benedict*, 15 Conn. 437. The court will not make the application to the debt least secured if thereby a surety will be prejudiced. *Pierce v. Sweet*, 33 Penn. St. 151.

<sup>1</sup> *Shipsey v. Bowery Nat. Bank*, 59 N. Y. 485.

<sup>2</sup> *Hunter v. Osterhoudt*, 11 Barb. 33; *Dows v. Morewood*, 10 Barb. 183.

<sup>3</sup> *Truscott v. King*, 6 N. Y. 147; *Worthley v. Emerson*, 116 Mass. 374.

and entitles him to the benefit of the application agreed upon or requested.<sup>1</sup> But after the right to make the application has passed to the creditor, the debtor cannot afterwards claim it.<sup>2</sup> Neither can a debtor's appropriation of a payment be diverted by the creditor upon mere equitable considerations, not amounting to an agreement between the parties, that the creditor shall have the right to appropriate payments otherwise than as directed by the debtor.<sup>3</sup>

As a rule, the law applies payments most beneficially to the debtor; and if a person owes a debt secured by mortgage and another by simple contract, the law will apply a general payment to the mortgage in the absence of any application by the parties.<sup>4</sup>

#### SECTION 4.—*Rights in the marshalling of assets.*

It not infrequently happens that a surety is also the creditor of the principal debtor, and holds in his hands a mortgage, or other security, given him by the principal as indemnity in his double capacity. In case of the insolvency of the principal and his failure to satisfy either demand, a contest often arises between the surety and the holder of the demand for which the surety is liable, over the distribution of the proceeds of the securities held by the surety, both claiming that the same should be first applied to the extinguishment of their respective demands.

In proceedings under the laws regulating assignments of insolvent debtors in trust for the benefit of their creditors, equitable principles prevail, and a creditor is allowed to prove his demand and take a dividend on his entire

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<sup>1</sup> Hansen v. Rounsavell, 74 Ill. 238.

<sup>2</sup> Bell v. Radcliff, 32 Ark. 645.

<sup>3</sup> Stewart v. Hopkins, 30 Ohio St. 502.

<sup>4</sup> Windsor v. Kennedy, 52 Miss. 164; Neal v. Allison, 50 Miss. 175; Moore v. Kiff, 78 Penn. St. 96; Harding v. Tift, 75 N. Y. 461.

demand, without regard to any collateral security he may hold.<sup>1</sup>

It is a general rule of equity that, where a creditor has a lien upon two funds for the same debt, and another creditor has a subsequent lien upon one of the funds only, equity will require the former to resort, in the first instance, to the fund upon which the subsequent creditor has no lien, for the satisfaction of his debt.<sup>2</sup> But this rule is subject to some qualification. Such a course must appear to be necessary for the payment and satisfaction of both debts;<sup>3</sup> it must not operate to prejudice the rights of the first creditor to the double fund;<sup>4</sup> neither must there be any reasonable doubt of the sufficiency of the one fund to satisfy his debt.<sup>5</sup> The rule will not be applied to defeat an equity of the first creditor on either fund attaching prior to the existence of the latter's lien,<sup>6</sup> nor to compel the creditor to resort to a fund, or property, beyond the jurisdiction of the court, and to go into the other jurisdiction and pursue his remedy there;<sup>7</sup> nor where the fund to be resorted to is dubious, and can be reached only by litigation;<sup>8</sup> nor where it will act injuriously to a third party, over whom the party claiming the benefit of the rule has no superior equity.<sup>9</sup>

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<sup>1</sup> *Jervis v. Smith*, 1 Buff. (N. Y.) Superior Ct. 189. See *Miller's Estate*, 82 Penn. St. 113; *Graeff's Appeal*, 79 Penn. St. 146; *Wurtz v. Hart*, 13 Iowa, 515.

<sup>2</sup> *Story's Eq. Jur.* 633; *Herriman v. Skillman*, 33 Barb. 378; *Glass v. Pullen*, 6 Bush. (Ky.) 346; *House v. Thompson*, 3 Head (Tenn.), 512; *Goss v. Lester*, 1 Wis. 43; *Hurd v. Eaton*, 28 Ill. 122; *Warren v. Warren*, 30 Vt. 530.

<sup>3</sup> *Herriman v. Skillman*, 33 Barb. 378.

<sup>4</sup> *Herriman v. Skillman*, 33 Barb. 378; *Wolf v. Smith*, 36 Iowa, 454; *Clarke v. Bancroft*, 13 Iowa, 320; *Walker v. Covar*, 2 S. C. 16; *Jervis v. Smith*, 7 Abb. (N. Y.) N. S. 217. See *Denham v. Williams*, 39 Ga. 312.

<sup>5</sup> *Evertson v. Booth*, 19 Johns. 486; *Coker v. Shropshire*, 50 Ala. 542.

<sup>6</sup> *McCormick's Appeal*, 57 Penn. St. 54.

<sup>7</sup> *Denham v. Williams*, 39 Ga. 312.

<sup>8</sup> *Walker v. Covar*, 2 S. C. 16.

<sup>9</sup> *Mechanics, &c. Association v. Conover*, 1 McCarter (N. J.), 219; *Morrison v. Kurtz*, 15 Ill. 193.

If a creditor holds security, generally, for various notes of his debtor, some of which bear the names of sureties, he may, in case of the insolvency of the debtor and some of the sureties, apply the security towards the payment of such of the notes as may be necessary for his own protection. If the solvent sureties desire to avail themselves, in any way, of the security, they must first pay, or offer to pay, the whole of the notes for which the security was given.<sup>1</sup>

In a deed of trust to indemnify sureties by giving them a preference, the debt of the creditor supplies the consideration to support the deed, and the interest of the creditor is, therefore, the primary object to be protected in equity. The indemnity of the surety, though expressed to be the first object, is but secondary and incidental to the other.<sup>2</sup>

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<sup>1</sup> *Wilcox v. Fairhaven Bank*, 7 Allen (Mass.), 270.

<sup>2</sup> *Wiswall v. Potts*, 5 Jones Eq. (N. C.) 184.



## CHAPTER XIX.

### ACTIONS AGAINST SURETIES AND GUARANTORS AND DEFENSES THERETO.

#### SECTION 1.—Parties plaintiff.

- 2.—Parties defendant.
- 3.—Requisites of the complaint.
- 4.—Plaintiff's evidence.
- 5.—Defenses. Want of capacity of principal to contract.
- 6.—Denial of official capacity of principal, and defenses to actions on official bonds.
- 7.—Assigned demands.
- 8.—Set-off, counter-claim, &c.
- 9.—Matters in mitigation of damages.
- 10.—Extension of time of payment.
- 11.—Laches of creditor.
- 12.—Release of levy.
- 13.—Alteration or merger of original contract.
- 14.—Statute of limitations.
- 15.—Statute of frauds.
- 16.—Infancy or coverture.
- 17.—Impossibility of performance.
- 18.—Fraud in obtaining the contract.
- 19.—Want of notice.
- 20.—Defects in execution, &c.
- 21.—Surrender of securities.
- 22.—Want of delivery.
- 23.—Want, illegality or failure of consideration.
- 24.—Proof of the existence of the relation.
- 25.—Proof of knowledge of the relation.
- 26.—Evidence impeaching the instrument.
- 27.—Evidence of matters subsequent to the contract.

#### SECTION 1.—*Parties plaintiff.*

The proper parties to be made plaintiff in an action to enforce the liability created by contracts of guaranty and suretyship must depend, in a great measure, upon the rules of practice in the State where the action is brought.

In some of the States an action on a bond must be brought in the name of the obligee, although he may have parted with all his interest therein ; while in other States the suit must be brought in the name of the real party in interest.

Under the statutes of some of the States, a contract of guaranty is assignable, and the assignee may sue thereon in his own name ;<sup>1</sup> while in other States it has been held that such contracts are not negotiable, and that no suit can be maintained thereon except by the party with whom the contract is made.<sup>2</sup> In New York, any person who can enforce the principal contract can enforce the guaranty ;<sup>3</sup> and the assignee of a bond and mortgage can sue upon a guaranty of collection by a previous assignor, although the guaranty is not in terms transferred with the principal obligation.

So, a guaranty may be, in its terms, negotiable, and, when so drawn, an action will lie upon it in the name of any subsequent holder.<sup>4</sup>

The question as to how far a guaranty is negotiable or assignable has been discussed in a previous chapter of this work and need not be here repeated.<sup>5</sup>

In respect to actions on the bonds of executors and administrators, no general rule can be given as to who should be made plaintiff, as the question is, for the most part, controlled by statute in the several States.

Under the Mississippi code, any persons interested in an estate, either as legatees, distributees, or creditors, may join in a suit upon an administrator's bond for a *devastavit*.<sup>6</sup>

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<sup>1</sup> First National Bank *v.* Carpenter, 41 Iowa, 518. See *ante*, p. 14.

<sup>2</sup> McDoal *v.* Yeomans, 8 Watts, 361 ; TenEyck *v.* Brown, 4 Chand. (Wis.) 151 ; Smith *v.* Dickinson, 6 Humph. 261 ; and see *ante*, p. 14.

<sup>3</sup> Craig *v.* Parkis, 40 N. Y. 181 ; Claflin *v.* Ostrom, 54 N. Y. 581.

<sup>4</sup> Ketchell *v.* Burns, 24 Wend. 456.

<sup>5</sup> See *ante*, p. 14.

<sup>6</sup> Miss. Code. 1871, § 1180 ; Pilcher *v.* Drennan, 51 Miss. 873.

An administrator, *de bonis non*, may sue a former administrator of the same estate, on his bond, and join the executor of a deceased surety;<sup>1</sup> and, on the death of an administrator, the only party who can bring suit on the bond is the administrator *de bonis non*.<sup>2</sup>

Under the provisions of the New York Code of Civil Procedure, where an execution, issued upon a surrogate's decree, against the property of an executor, administrator, testamentary trustee, or guardian, has been returned wholly or partly unsatisfied, an action to recover the sum remaining uncollected, may be maintained upon his official bond, by and in the name of the person in whose favor the decree was made. If the principal debtor is a resident of the State, the execution must have been issued to the county where he resides.<sup>3</sup>

Where letters have been revoked by a decree of the surrogate's court, the successor of the executor, administrator, or guardian, whose letters are so revoked, may maintain an action upon his predecessor's official bond, in which he may recover any money, or the full value of any other property, received by the principal in the bond, and not duly administered by him; and to the full extent of any injury, sustained by the estate of the decedent or of the infant, as the case may be, by any act or omission of the principal.<sup>4</sup>

Where the letters of an executor or administrator have been so revoked, and no successor is appointed, any person aggrieved may, upon obtaining an order from the surrogate, granting him leave so to do, maintain an action upon the official bond of the executor or administrator, in behalf of himself and all others interested; in which

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<sup>1</sup> *Myers v. State*, 47 Ind. 293. See *Walton v. Walton*, 1 Keyes, 15.

<sup>2</sup> *State v. Goodman*, 72 N. C. 508; *Kerrin v. Roberson*, 49 Mo. 252.

<sup>3</sup> Code Civ. Pro. § 2607.

<sup>4</sup> Code Civ. Pro. § 2608.

the plaintiff may recover any money, or the full value of any other property, received by the principal in the bond, and not duly administered by him, and to the full extent of any injury sustained by the estate of the decedent by any act or omission of the principal.<sup>1</sup>

Prior to this enactment, it was held that the surrogate might assign an administrator's bond, for the purpose of prosecution, and that the action might then be brought by the assignee, in his own name, as the real party in interest, or in the name of the people, as the nominal obligees.<sup>2</sup>

In an action brought by a guardian upon the bond of a former guardian, in which the plaintiff is surety, the wards of the plaintiff must be made parties plaintiff, and a *prochein ami* appointed to protect their interests.<sup>3</sup>

A person, after arriving at mature age, may maintain an action against his guardian and sureties on a bond executed to the State as obligee.<sup>4</sup> Before that time the action must be brought by the successors of the defaulting guardian;<sup>5</sup> and an infant ward cannot recover money in the guardian's hands until his removal from the office of guardian.<sup>6</sup>

The right to maintain an action on a recognizance is, as a general rule, a matter of statutory regulation. An action on a recognizance taken in a bastardy case, under the Ohio statute,<sup>7</sup> must be brought in the name of the State.<sup>8</sup>

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<sup>1</sup> Code Civ. Pro. § 2609.

<sup>2</sup> Cridler v. Curry, 44 How. (N. Y.) 345. See Baggott v. Boulger, 2 Duer, 160; People v. Laws, 4 Abb. Pr. R. 292.

<sup>3</sup> Wilson v. Houston, 76 N. C. 375.

<sup>4</sup> Crowell v. Ward, 16 Kans. 60.

<sup>5</sup> Blackwell v. State, 26 Ind. 204.

<sup>6</sup> Eli v. Hawkins, 15 Ind. 230.

<sup>7</sup> Act of April 13, 1873.

<sup>8</sup> Clark v. Petty, 29 Ohio St. 452.

Under the Iowa Statutes,<sup>1</sup> giving certain penal forfeitures to the county school fund, an action on a forfeited recognizance, taken in the name of the State, may probably be brought in the name of the county in which the principal was bound to appear.<sup>2</sup> The people have a legal capacity to sue upon a breach of a bail bond,<sup>3</sup> and, generally speaking, the action should be brought in the name of the State.

Under the provisions of the New York Code of Civil Procedure, when a sheriff is liable for the escape of a prisoner committed to his custody, or when the sheriff, a surrogate, or an officer acting as a surrogate, is guilty of any actionable default or misconduct in office, or where a certified copy of the order or judgment of a court directing a county treasurer to pay, or deliver, to one or more persons designated therein, any stocks, money, securities, or other investments, held by him subject to the direction of the court, is served upon the county treasurer, and he fails to obey the direction, the person injured thereby may apply for leave to prosecute the delinquent's official bond. Upon a proper application being made, the court must grant an order permitting the applicant to maintain an action on the bond,<sup>4</sup>

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<sup>1</sup> Iowa Revision, §§ 3729, 4993.

<sup>2</sup> *Shelby County v. Simmonds*, 33 Iowa, 345.

<sup>3</sup> *People v. Bugbee*, 1 Idaho Ter. 96.

<sup>4</sup> Code of Civ. Pro. §§ 1880-1890. The Code, also, provides that where a public officer is required to give a bond to the people, and special provision is not made by law for the prosecution of the bond, by or for the benefit of a person who has sustained by his default, delinquency, or misconduct any injury for which the sureties on the bond are liable, such person sustaining the injury may apply for, and, in a proper case, obtain leave to prosecute the delinquent's official bond. *Id.* §§ 1888, 1889. The action may, thereupon, be brought and maintained by him as plaintiff, as if he were the obligee named in the bond.

A receiver, an assignee of an insolvent debtor, or a trustee, or other officer appointed by the court or a judge, is a public officer within the meaning of section 1888, above cited. Code Civ. Pro. § 1890. The statute also de-

and the action may, thereupon, be brought by the applicant as plaintiff, and maintained by him as if he was the obligee named in the bond. Section 814 of the same act provides as follows :

“Where a bond or undertaking has been given, as prescribed by law, in the course of an action or special proceeding, to the people or to a public officer, for the benefit of a party or other person interested, and provision is not specially made by law for the prosecution thereof, the party or other person so interested may maintain an action, in his own name, for a breach of the condition of the bond, or of the terms of the undertaking, upon the procuring an order granting him leave so to do. The order may be made by the court in which the action is or was pending ; or by a superior city court, the Marine Court of the city of New York, or a county court, if the bond or undertaking was given in a special proceeding, pending before a judge of that court ; or, in any other case, by the Supreme Court. Notice of the application therefor must be given, as directed by the court or judge, to the persons interested in the disposition of the proceeds.”

#### SECTION 2.—*Parties defendant.*

As a general rule a creditor, on the default of the principal debtor in a contract, may, at his election, proceed to enforce his debt against both principal and

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signates the courts to which the application for leave to sue may be made (Code Civ. Pro. §§ 1880–1890); directs as to the character and contents of the moving papers (Id. §§ 1880, 1891), as to notice of the application (Id. § 1892), the court in which the action is to be brought (Id. §§ 1881, 1890), the manner in which the execution issued on the judgment recovered against the officer and his sureties shall be levied (Id. § 1883); and the disposition of the moneys made under the execution (Id. § 1885.) It also provides for an order vacating the order granting leave to sue, on the application of the officer, or either of his sureties. Id § 1892.

surety, or either,<sup>1</sup> although he can have but one satisfaction of his demand.<sup>2</sup>

As has been shown, the surety may, in a proper case, compel the creditor to proceed against the principal debtor to obtain the satisfaction of his debt.<sup>3</sup> But, even this right is not without limitation,<sup>4</sup> and where the right is not asserted by the surety the creditor may proceed against both, or either. The surety of a lessee cannot compel the lessor to proceed against the lessee by a distress warrant,<sup>5</sup> nor can he require the creditor to pursue collateral remedies before resorting to the property of the surety.<sup>6</sup> The doctrine, that the creditor is under an equitable obligation to obtain judgment from the principal debtor, if possible, before resorting to the surety, is not recognized at law.<sup>7</sup>

In some States, it is provided by statute that the property of the surety shall not be levied upon without an affidavit of the insolvency of the principal in the execution. But this provision is intended for the benefit of the surety, or those claiming under him, and has no application to a stranger who claims title adversely to the surety.<sup>8</sup> Where this statute exists, the sureties, in a

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<sup>1</sup> *Shannon v. McMullin*, 25 Gratt. (Va.) 211; *White v. Hart*, 35 Ga. 269; *Watson v. Beabout*, 18 Ind. 281; *Geldis v. Hawk*, 1 Watts, 280.

<sup>2</sup> *Muscatine v. Mississippi, &c. R. R. Co.* 1 Dill. 536; *Garey v. Hignutt*, 32 Mo. 552.

<sup>3</sup> See *ante*, p. 300.

<sup>4</sup> In *Re Babcock*, 3 Story, 393; *Huey v. Pinney*, 5 Minn. 310.

<sup>5</sup> *Brooks v. Carter*, 36 Ala. 682.

<sup>6</sup> *Brown v. Brown*, 17 Ind. 475.

<sup>7</sup> *Huey v. Pinney*, 5 Minn. 310.

<sup>8</sup> *Hyman v. Seaman*, 33 Miss. 185.

The New York Code of Civil Procedure provides, that when an execution is issued upon a judgment recovered against the sheriff and his sureties, in an action on his official bond, the plaintiff's attorney must indorse thereon a direction to collect the same, in the first place, out of the property of the sheriff, and if sufficient property of the sheriff cannot be found, then to collect the deficiency out of the property of the surety or sureties. Code Civ. Pro. §

judgment, are severally liable, and the plaintiff has the right to enforce it against any one of them, being only bound to proceed first against the estate of the principal, if sufficient to pay it;<sup>1</sup> and the statute does not apply to a case where judgment is rendered against principal and surety as joint makers of a note, and the fact of suretyship is not stated.<sup>2</sup>

Independent of any statutory provision, a creditor who has obtained a judgment on a note against both principal and surety, may take the property of either in payment of the debt.<sup>3</sup> And where a person contracts in terms as principal, he cannot, though in fact a surety, protect himself as such, against the claims of the creditor.<sup>4</sup>

Where a statute provides that the creditor shall first proceed against the principal before seeking to enforce his claim against the surety, the creditor may proceed at once against the surety if the principal is beyond the jurisdiction of the court,<sup>5</sup> and may maintain his action against the surety where the principal is dead, without first proceeding against his representative.<sup>6</sup>

Where a creditor has no security for his debt but a joint and several bond, entered into by several persons as sureties with their principal, some of whom are dead, he may prosecute his suit against the surviving sureties, with-

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1883. The same provision is made applicable to executions in actions on the official bonds of surrogates, or an officer acting as a surrogate, a county treasurer, or other persons required by law to give an official bond to the people, where no special provision has been made by law for the prosecution of the same. Code Civ. Pro. § 1889. See *Id.* § 1890.

<sup>1</sup> *Davis v. Hooper*, 33 Miss. 173.

<sup>2</sup> *Work v. Harper*, 31 Miss. 107; *State v. Williams*, 2 Carter (Ind.), 175.

<sup>3</sup> *Fuller v. Loring*, 42 Me. 481.

<sup>4</sup> *Picot v. Signiago*, 22 Mo. 587; *Perkins v. Goodman*, 21 Barb. 218; *Yates v. Donaldson*, 5 Md. 389; *Ennis v. Crump*, 6 Texas, 85.

<sup>5</sup> *Petty v. Cleveland*, 2 Texas, 404.

<sup>6</sup> *Scott v. Dewees*, 2 Texas, 153.



out reviving the proceedings against the representatives of the deceased co-sureties, and cannot be compelled to exhaust his several remedies against the several co-sureties for their equitable proportion, before calling on any one for the whole debt.<sup>1</sup> In fact, upon the death of one of the makers of a joint promissory note, who signed simply as surety, his estate is absolutely discharged from liability, both in law and equity, and his personal representatives are neither necessary nor proper parties in an action by the creditor on the note.<sup>2</sup>

In an action to enforce a contract of guaranty, the guarantor is the proper party defendant, and the principal debtor should not be joined. As has been shown, all the parties to a contract of suretyship may be joined as defendants; but a guarantor cannot be sued with his principal, for his engagement is strictly an individual contract, and not an engagement jointly with his principal.<sup>3</sup> In

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<sup>1</sup> Lowndes v. Pinckney, 2 Strobb. Eq. 44.

<sup>2</sup> Risley v. Brown, 67 N. Y. 160; Getty v. Binsse, 49 N. Y. 385; United States v. Price, 9 How. (U. S.) 83.

<sup>3</sup> McMillan v. Bull's Head Bank, 32 Ind. 11; S. C. 2 Am. R. 323; Central Savings Bank v. Shine, 40 Mo. 456; Griffin v. Grundy, 10 Iowa, 226; Harris v. Eldridge, 5 Abb. (N. Y.) New Cas. 278. See Barton v. Speis, 5 Hun, 60; N. Y. Code Civ. Pro. § 454, which provides that "Two or more persons, severally liable upon the same written instrument, including the parties to a bill of exchange or a promissory note, whether the action is brought upon the instrument, or by a party thereto to recover against other parties liable over to him; may, all or any of them, be included as defendants in the same action, at the option of the plaintiff."

In the case of Mowery v. Mast, decided by the Supreme Court of Nebraska, January 10th, 1880, it was held, that the provision of the code of that State (which is the same as in the Codes of Ohio, Florida, Minnesota, Oregon, Colorado, North Carolina, South Carolina and Wisconsin), that "persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, may, all or any of them, be included in the same action, at the option of the plaintiff, does not authorize the joinder of the maker and guarantor as defendants in the same action. In this case, Calvert made his promissory note to Mast, and, before delivery, Mowery wrote upon the back of the note a guaranty of payment, and a waiver of protest, demand

fact, in actions to enforce certain classes of guaranties, the creditor must be in position to show not only that he has used due diligence to collect his demand of the principal debtor, but also that he has exhausted all his legal remedies against his principal without avail.

On the death of a guardian, an action may at once be brought against the sureties on his bond for the recovery of moneys in his hands at the time of his death.<sup>1</sup> And when the guardian is a non-resident and dies, and there is no administrator upon his estate, and one of the sureties in the bond has died insolvent, the ward may maintain a bill in equity against the surviving surety, without making the representatives of the deceased obligor parties.<sup>2</sup>

In proceedings against an administrator for an account and final settlement of the estate, the sureties in the administration bond are not proper parties.<sup>3</sup> Their liability is upon the bond alone. If the bond is joint and several, the action on the bond may be brought against all or a part of the sureties named therein.<sup>4</sup> If the administrator

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and notice of non-payment. The court held, that the contract of guaranty was a separate and independent contract, and that not being liable as a maker of a note, he could not be joined in an action against the maker, citing *Phalen v. Dinger*, 4 E. D. Smith, 379; *Ridded v. Schuman*, 10 Barb. 633; *Tibbets v. Percy*, 24 Id. 39; *Allen v. Fosgate*, 11 How. Pr. 218; *Borden v. Gilbert*, 13 Wis. 670; *Virden v. Ellsworth*, 15 Ind. 144; *Bondwart v. Bladden*, 19 Id. 160.

In *Gale v. Van Arman*, 18 Ohio, 36, before the adoption of the Code, the Supreme Court held, that "where a stranger to a note payable in checks, at the time of the execution, wrote on the back and signed these words: 'I guarantee the fulfillment of the within contract,' it was a joint contract, and that the parties might be sued jointly upon it," citing *Leonard v. Sweetzer*, 16 Ohio, 1; *Stage v. Olds*, 12 Id. 158; *Bright v. Carpenter & Shuer*, 9 Id. 139. The decision is placed upon the ground that the instruments were executed by principal and surety at the same time, upon the same consideration, for the same purpose, and took effect from the same delivery.

<sup>1</sup> *State v. Thorn*, 28 Ind. 306.

<sup>2</sup> *Frierson v. Travis*, 39 Ala. 150.

<sup>3</sup> *Smith v. Everett*, 50 Miss. 575.

<sup>4</sup> *Cridler v. Curry*, 66 Barb. 336.

has given two bonds, one when the letters were issued, and one when the real estate was about to be sold, and both bonds contain the same condition, the sureties in the several bonds may be made joint defendants in the same action.<sup>1</sup>

Co-administrators who have given a joint bond as security for faithful administration, are jointly liable as principals for waste committed, without fault upon the part of either.<sup>2</sup> In an action by an administrator *de bonis non* upon the bond of a deceased executor of his testator's estate, the administrator of the executor and the surviving sureties may be made joint defendants.<sup>3</sup>

In Illinois, an action on an executor's bond may be maintained against a part only of the sureties therein.<sup>4</sup>

A prior and subsequent administrator of the same estate cannot be sued jointly on their separate bonds.<sup>5</sup>

### SECTION 3.—*Requisites of the complaint.*

In an action against the guarantors of a promissory note, the plaintiff must not only allege the making of the guaranty, but must also aver the consideration upon which the guaranty was made.<sup>6</sup> It must also contain an express averment of the facts showing the default of the principal, as, until such default, no responsibility attaches to the guarantor.<sup>7</sup>

Where notice to the guarantor of any fact is neces-

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<sup>1</sup> Powell v. Powell, 48 Cal. 235.

<sup>2</sup> Newton v. Newton, 53 N. H. 537; Braxton v. State, 25 Ind. 82.

<sup>3</sup> Braxton v. State, 25 Ind. 82.

<sup>4</sup> People v. Miller, 1 Scam. 83.

<sup>5</sup> Evans v. Hays, 3 Mo. 434.

<sup>6</sup> Greine v. Dodge, 2 Ham. 430; Bailey v. Freeman, 4 Johns. 280; Klein v. Currier, 14 Ill. 237.

<sup>7</sup> Mitchell v. Dall, 2 Har. & Gill. 159; Mickle v. Sanchez, 1 Cal. 200; Ilsley v. Jones, 12 Gray (Mass.), 260.

sary to fix his liability, the plaintiff must aver such notice, or an excuse for the want of notice.<sup>1</sup> It will be sufficient, however, if such notice is alleged in general terms.<sup>2</sup> Thus, the averment of notice in these words, "of all of which the defendant had due notice," is sufficient to let in proof of the facts.<sup>3</sup> It is also indispensably necessary that the plaintiff should allege due diligence in the prosecution of a suit against the principal obligor, or that he is insolvent and unable to pay.<sup>4</sup> In an action on a guaranty to pay a note if the maker does not, a declaration is sufficient which sets out the note, the guaranty (either in terms or according to its legal effect), the facts from which due diligence on the part of the plaintiff is to be inferred, or the insolvency of the maker of the note, and a breach of the guaranty.<sup>5</sup> In an action against the guarantor of a bond, entered into in consideration of a forbearance to sue, the plaintiff must aver and prove the forbearance as the performance of a condition precedent.<sup>6</sup>

It is also held, that to authorize a recovery on a general letter of guaranty it must be averred and proved that the guaranty was accepted, the credit given on the faith of the guaranty, and also that notice was given to the guarantor, in a reasonable time, of the credit given, its extent and terms, and that the guarantor would be looked to for payment.<sup>7</sup> But if the declaration omits to state when and where the notice was given, it will not be a ground for arresting judgment.<sup>8</sup>

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<sup>1</sup> *Lewis v. Brewster*, 2 McLean, 21; *Sylvester v. Downer*, 18 Vt. 32; *Fay v. Hall*, 25 Ala. 704.

<sup>2</sup> *Oaks v. Weller*, 16 Vt. 63; *Cahuzac v. Samini*, 29 Ala. 288.

<sup>3</sup> *Williams v. Staton*, 5 Smeedes & Marsh, 347; *Fay v. Hall*, 25 Ala. 704.

<sup>4</sup> *Gaster v. Ashley*, 1 Pike, 325; *Sylvester v. Downer*, 18 Vt. 32.

<sup>5</sup> *Nesbit v. Bradford*, 6 Ala. 746.

<sup>6</sup> *Thomas v. Croft*, 1 Strobb. 40. See *Steadman v. Guthrie*, 4 Met. (Ky.) 147.

<sup>7</sup> *Kincheloe v. Holmes*, 7 B. Mon. 5.

<sup>8</sup> *Dayton v. Williams*, 2 Doug. 31.

The rule requiring the plaintiff to allege the consideration upon which a guaranty was made, does not require that the consideration of the assignment of a lease should be set out in an action on a guaranty made by the assignor for the lessee at the time of the assignment.<sup>1</sup>

In declaring against a surety, the contract of the principal must be set out, the breach of it, and the damage, as if the action were against the principal.<sup>2</sup>

In an action against the guarantor of a note, the declaration must allege a demand on the maker of the note at its maturity.<sup>3</sup>

In an action on an official bond, the complaint must show, in order to charge the sureties, that the act relied upon as a breach was done by the officer by virtue of his office and not merely by color of it.<sup>4</sup>

When the plaintiff seeks to charge a defendant as a maker or guarantor of a non-negotiable note by reason of his having written his name across the back, he must aver, in his complaint, that the defendant so wrote his name with the intention to become liable in such character.<sup>5</sup>

#### SECTION 4.—*Plaintiff's evidence.*

A written guaranty is, as against the signer, evidence of all the facts therein recited.<sup>6</sup> If it is, on its face, addressed to one person, it cannot be given in evidence in an action brought thereon by two persons.<sup>7</sup> If the action is on a guaranty of a bond, given in consideration of for-

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<sup>1</sup> Harper v. Pound, 10 Ind. 32.

<sup>2</sup> Cooney v. Winants, 19 Wend. 504.

<sup>3</sup> January v. Duncan, 3 McLean 19.

<sup>4</sup> Gerber v. Ackley, 37 Wis. 43; 19 Am. R. 751.

<sup>5</sup> Cawley v. Costello, 15 Hun, 303.

<sup>6</sup> Peck v. Barney, 12 Vt. 72.

<sup>7</sup> Allison v. Rutledge, 5 Yerg. 193.

bearance to sue, the plaintiff must prove the agreement to guaranty, and the actual forbearance.<sup>1</sup> If the plaintiff declares upon and sets out an agreement in writing, signed by the defendant, and indorsed upon a promissory note, to which note the defendant was not a party, whereby the defendant, for a certain consideration, guaranteed the payment of the note, the plaintiff must prove the written agreement, and cannot support his allegation by the production of the note with the signature of the defendant on the back, and parol evidence of the agreement set out in the declaration.<sup>2</sup> Where one person has guaranteed to another any debt which a third person may owe him, and, in an action brought on the guaranty, the plaintiff alleges that such third person was indebted to him on a certain promissory note, the plaintiff may, for preliminary purposes, give in evidence a judgment recovered by him against the third person on the note; but the judgment will not be evidence, as against the guarantor, that the third person was indebted to the plaintiff on the note.<sup>3</sup>

On a contract to save harmless, the plaintiff must prove that he has been damnified. If the damage he has sustained results from the recovery of a judgment against him, he must not only set forth the judgment, but show that he has paid all or a part of it.<sup>4</sup> If the action is brought on a promise made by the defendant to indemnify the plaintiff for all loss, damage and expense which he shall incur or be put to by reason of giving up a horse in his possession to the defendant, and in bringing a suit

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<sup>1</sup> *Thomas v. Croft*, 1 Strobb. 40; *Smith v. Compton* 6 Cal. 24.

<sup>2</sup> *Crozer v. Chambers*, 1 Spencer, 256. But see *Beckwith v. Angel*, 6 Conn. 315.

<sup>3</sup> *Commercial Bank of Albany v. Eddy*, 7 Met. 181. In an action upon a contract of guaranty, a judgment against the person to be indemnified, if fairly obtained, and especially if obtained on notice to the guarantor, is admissible evidence against the defendant. *Clark v. Carrington*, 7 Cranch, 308.

<sup>4</sup> *Aberdeen v. Blackman*, 6 Hill, 324.

against the person from whom he purchased it, for fraudulently selling to him a horse belonging to another, in case he should fail in such suit, the plaintiff may put in evidence the record of a judgment in an action commenced by him against such vendor, in which the plaintiff failed to recover, to show the bringing and failure of the action; but, to prove the amount of damages to which he is entitled he must prove the title to the horse.<sup>1</sup>

In some States, it is held that to authorize a recovery on a general letter of guaranty, it must be proved that the guaranty was accepted; that credit given on the faith of the guaranty; that notice was given to the guarantor, in a reasonable time, of the credit given, its extent and terms; that the guarantor would be looked to for payment;<sup>2</sup> that a demand for payment had been made on the principal debtor; that payment had been refused, and notice of the default given to the guarantor, or, in lieu of such demand and notice, that the principal was insolvent when the demand became due.<sup>3</sup> Where proof of notice is required, it is not necessary to prove express notice, but notice may be proved by circumstances.<sup>4</sup>

Every guaranty must have some consideration to support it. If it is made at the time of the contract to which it relates, so as to constitute a part of the consideration of that contract, it is sufficient; but if the guaranty is subsequent to the contract there must be a distinct consideration to support it.<sup>5</sup> It is not, in general, essential to the validity of the guaranty that the nature of the consideration should be expressed therein,

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<sup>1</sup> *Lincoln v. Blanchard*, 17 Vt. 464.

<sup>2</sup> *Kincheloe v. Holmes*, 7 B. Mon. 5; *Lawton v. Mauer*, 9 Rich. Law S. C. 335; *McCollum v. Cushing*, 22 Ark. 540.

<sup>3</sup> *Rankin v. Childs*, 9 Mo. 673; *McCollum v. Cushing*, 22 Ark. 540.

<sup>4</sup> *Rankin v. Childs*, 9 Mo. 673.

<sup>5</sup> *Bebee v. Moore*, 3 McLean, 387; *Joslyn v. Collinson*, 26 Ill. 61.

and it is competent to prove the nature of the consideration by parol, though the guaranty expresses that it is "for value received."<sup>1</sup>

Where a person agrees to guaranty the payment of a note, in consideration of forbearance of the holder to collect it of the maker, and in pursuance of the agreement indorses his name in blank on the note, and the holder afterwards, in pursuance of the agreement, fills up the indorsement with the words, "In consideration of further forbearance, I guaranty the payment of the within note," the holder may show, in an action on the indorsement, the special agreement, and may recover thereon without proof of the demand and notice required in cases of bills and notes regularly negotiated.<sup>2</sup> On a parol promise to guaranty bonds, the plaintiff may give in evidence the declarations to that effect, made by the guarantor to the scrivener while drawing the instrument.<sup>3</sup> For the purpose of identifying the instrument to which a written guaranty relates, it is competent to show by parol that a note drawn by A, payable to the order of B, and by him transferred to C, was intended

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<sup>1</sup> *Jones v. Palmer*, 1 Doug. 379. Where the original contract and the guaranty are executed at the same time, no express consideration for the guaranty need be proved. *Campbell v. Knapp*, 15 Penn. St. 27; *Klein v. Currier*, 14 Ill. 237.

And where the guaranty is without date, and there is no direct proof of the time when it was made, it may be left to the jury to find that it was simultaneous with the note itself. *Bickford v. Gibbs*, 8 Cush. 164. But, if it appears that the guaranty was affixed in pursuance of a subsequent arrangement the burden of proof is on the plaintiff. *Klein v. Currier*, 14 Ill. 237. The consideration of a guaranty may always be shown by parol. *Gregory v. Gleed*, 33 Vt. 405; *Nichols v. Bell*, 1 Jones Law (N. C.), 32. And so may the time of its execution. *Draper v. Snow*, 20 N. Y. 331. And if the guaranty and the principal contract are on the same paper it may be presumed that the guaranty and the contract were executed at the same time. *Id.*

<sup>2</sup> *Beckwith v. Angel*, 6 Conn. 315.

<sup>3</sup> *Bollinger v. Eckert*, 16 S. & R. 422.



by the description in the guaranty, as "A's note payable to C."<sup>1</sup> So, where a person transfers, by delivery to another, a note of a third person, payable to bearer, saying at the time that the maker, "although a poor man, is perfectly good for his contracts, and, if he is not good, I am good," these sayings may be given in evidence, in support of an allegation and undertaking to guaranty the payment of the note.<sup>2</sup>

In an action on a guaranty of payment, the plaintiff must show, as a part of his case, that payment has not been made.<sup>3</sup> And where the action is on a guaranty of collection, the plaintiff must show that he has exhausted his legal remedies against the principal debtor without avail,<sup>4</sup> or has used due diligence to collect the demand of the principal debtor,<sup>5</sup> or that the latter, at the time the debt matured, was wholly insolvent.<sup>6</sup> The fact of the debtor's insolvency may be proved by parol as well as by record.<sup>7</sup> The return of an execution against the principal, unsatisfied, is *prima facie* evidence of his insolvency.<sup>8</sup>

Where proof of notice of acceptance of the guaranty is required, it is sufficient to show knowledge on the part of the guarantor, from the relations of the parties, that the goods were furnished as contemplated in the guaranty, and the amount furnished, though not with exactness.<sup>9</sup>

Parol evidence is admissible to aid the court in construing the guaranty where the language used is ambiguous.<sup>10</sup>

<sup>1</sup> Eckel v. Jones, 8 Barr, 501.

<sup>2</sup> Crenshaw v. Jackson, 6 Ga. 509.

<sup>3</sup> Craig v. Phipps, 23 Miss. 240.

<sup>4</sup> Craig v. Parkis, 40 N. Y. 181; French v. Marsh, 29 Wis. 649.

<sup>5</sup> Woods v. Sherman, 71 Penn. St. 100; Aldrich v. Chubb, 35 Mich. 350.

<sup>6</sup> Woods v. Sherman, 71 Penn. St. 100.

<sup>7</sup> McClurg v. Fryer, 15 Penn. St. 293.

<sup>8</sup> Brown v. Brooks, 25 Penn. St. 210.

<sup>9</sup> Noyes v. Nichols, 28 Vt. 160.

<sup>10</sup> Hood v. Grace, 7 Hurl. & Nor. 494. And see *ante*, p. 111. Crist v. Burlingame, 62 Barb. 351.

In an action on a guaranty of the sale of goods, the plaintiff must prove that the purchaser has been requested, and refused, or failed to pay.<sup>1</sup>

If the guaranty is conditional, and the liability of the guarantor made to depend upon the performance of a certain act, or the happening of a certain contingency, the plaintiff must show that the act was performed, or that the contingency happened before the commencement of the action.<sup>2</sup>

In actions against sureties, the facts which the plaintiff must prove in order to entitle him to recover, will, of course, depend upon the pleadings and the nature of the action.

Confessions of the principal debtor made in the absence of the surety are not evidence against a surety,<sup>3</sup> nor will a verdict against a principal in a recognizance,<sup>4</sup> or the record of a judgment against a guardian alone,<sup>5</sup> or the record of a recovery by the creditor of an intestate against his administrator,<sup>6</sup> be evidence against the surety. A judgment against the principal in the bond is not conclusive evidence against his sureties;<sup>7</sup> and in an action on an official bond, the declaration is to be taken as true against the principal alone on his default, and does not prejudice the sureties in their defense.<sup>8</sup> But a judgment by default against both principal and surety in a bond of indemnity, is, at least, *prima facie* evidence against

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<sup>1</sup> *Illsley v. Jones*, 12 Gray (Mass.), 260.

<sup>2</sup> See *Hill v. Nuttall*, 17 C. B. (N. S.) 262; *Talmadge v. Williams*, 27 La. Ann. 653.

<sup>3</sup> *Boston Hat Manufactory v. Messinger*, 2 Pick. 223; *Dexter v. Clemens*, 17 Pick. 175.

<sup>4</sup> *Respublica v. Davis*, 3 Yeates, 128.

<sup>5</sup> *M·Kellar v. Rowell*, 4 Hawks, 34.

<sup>6</sup> *Chairman v. Mecklenburg County Court*, 4 Hawks, 43.

<sup>7</sup> *Mumford v. Overseers*, 2 Rand, 313; *Atkins v. Baily*, 9 Yerg. 111.

<sup>8</sup> *Foxcroft v. Nevens*, 4 Greenl. 72.

them.<sup>1</sup> In a joint action against a cashier and his sureties on his bond, the admissions and declarations of the cashier as to his defaults are evidence against the sureties;<sup>2</sup> and generally, in an action against the joint obligors in a bond, the admissions of one are evidence against his co-obligors, even though sureties.<sup>3</sup> Acknowledgments of a principal are evidence against a surety,

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<sup>1</sup> Lee v. Clark, 1 Hill, 56.

It cannot be said that the effect of a judgment against the principal as evidence in an action against the surety is clearly settled. In Wisconsin, it is held that a judgment against the principal in an official bond is admissible against the sureties in an action upon the bond, as at least *prima facie* evidence of the plaintiff's right to recover, and of the amount he is entitled to recover, where it appears by the record, that it was recovered for acts or omissions which would be a breach of the conditions of the bond.

Probably the true rule was stated by Chief Justice Shaw, in the case of City of Lowell v. Palmer, 10 Metc. 309, 315. "When one is responsible by force of law or by contract for the faithful performance of the duty of another, a judgment against that other for the failure of the performance of that duty, if not conclusive, is *prima facie* evidence, in a suit against the party so responsible for that other. If it can be made to appear that such judgment was obtained by fraud or collusion, it will be wholly set aside. But otherwise it is *prima facie* evidence, to stand until impeached, or contradicted in whole or in part, by countervailing proofs." In New Jersey, it is held that as a general rule, a judgment against the principal alone is evidence as against the surety of the fact of its recovery only, and not of any fact which it was necessary to find in order to recover such judgment. De Greiff v. Wilson, 30 N. J. Eq. 435.

In New York, it is held that where one person has become obligated to protect another against the consequences of his or her default in payment, a judgment regularly recovered against the party entitled to such protection is *prima facie* evidence of the facts established by it in his favor, in an action against the person bound to make the indemnity. Comstock v. Drohan, 8 Hun, 373; 71 N. Y. 9. See, also, Bridgeport Fire Ins. Co. v. Wilson, 34 N. Y. 275; Konitzky v. Meyer, 49 N. Y. 571; O'Brien v. McCann, 58 N. Y. 373; Train v. Gold, 5 Pick. 380; Leather v. Poultney, 4 Binney, 352; Carmack v. Com. 5 Binney, 184; Mumford v. Overseers, 2 Rand, 313; State v. Colerick, 3 Ham. 487; Clark v. Carrington, 7 Cranch. 308; New York v. Ryan, 7 Daly, 436; Germain v. Wing, 1 Sheld. 441.

<sup>2</sup> Amherst Bank v. Root, 2 Met. 522.

<sup>3</sup> Montgomery v. Dillingham, 3 Smedes & Marsh. 647; Armstrong v. Farrar, 8 Mo. 627. See Walker v. Pierce, 21 Gratt. (Va.) 732.

unless there is proof of a combination.<sup>1</sup> Thus, if the principal admits the contract to be binding on him, it is also binding on the surety, unless there be a fraudulent collusion between the debtor and creditor to charge the surety.<sup>2</sup> But, it is also held that a surety is not bound by the admissions of his principal not made in the course of his business.<sup>3</sup>

A judgment against a tenant is admissible in evidence in an action against the surety;<sup>4</sup> and the report of a referee assessing damages sustained in consequence of an injunction, is, in the absence of fraud, when duly confirmed, conclusive upon the sureties in the undertaking given on granting the injunction, although they had no notice of the proceedings.<sup>5</sup> So, in the absence of fraud or collusion, the decree of a surrogate upon the final accounting of an executor or administrator, is conclusive upon the sureties in the executor's or administrator's bond.<sup>6</sup>

In actions against a principal and his sureties, evidence which is admissible against the principal may be inadmissible against the sureties. In such case the evidence will be admitted, and, on request, the court will instruct the jury to disregard it, so far as the sureties are concerned.<sup>7</sup>

The declarations of a principal, made during the transaction of the business for which the surety is bound, so as to become part of the *res gestae*, are competent evidence against the surety; but his declarations, subsequently made, are not competent.<sup>8</sup> A surety is considered

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<sup>1</sup> Commonwealth v. Kendig, 2 Barr, 448.

<sup>2</sup> Evans v. Keeland, 9 Ala. 42.

<sup>3</sup> Blair v. Perpetual Ins. Co. 10 Mo. 559.

<sup>4</sup> Strong v. Giltman, 7 Phil. (Pa.) 176.

<sup>5</sup> Jordan v. Volkenning, 72 N. Y. 300; Methodist Churches of N. Y. v. Barker, 18 N. Y. 463; Hotchkiss v. Platt, 7 Hun, 56.

<sup>6</sup> Casoni v. Jerome, 58 N. Y. 315; Scofield v. Churchill, 72 N. Y. 565.

<sup>7</sup> Union &c. Association v. Edwards, 47 Mo. 445.

<sup>8</sup> Hatch v. Elkins, 65 N. Y. 489; Hotchkiss v. Lyon, 2 Blackf. 222;

bound only by the actual conduct of the party, and not for whatever he might say he had done, and therefore is entitled to proof of his conduct, by original evidence, when it can be had, excluding all declarations of the principal made subsequent to the act to which they relate.<sup>1</sup> In an action on a promise to guarantee the payment for such goods as the plaintiff should send to a third person, in the way of their trade, the admissions of such third person, as to the delivery of goods to him, are not competent evidence against the defendant.<sup>2</sup>

In an action on the guaranty of a promissory note, it is unnecessary to prove the signature of the maker, for the reason that the guaranty by implication imports that the antecedent names on the note are genuine, and that the party subsequently transferring the paper has a good title, which he transfers.<sup>3</sup>

Where one of two partners has subscribed the firm name to a note as sureties for a third person, without the authority or consent of the other partners, the plaintiff must prove, in order to recover against the other partners, that the signature was made with the consent or by authority of the firm,<sup>4</sup> or that they subsequently ratified the act.<sup>5</sup>

A precedent authority for such purpose may be implied from the common course of business of the firm, or the previous course of dealing between the parties; and a subsequent ratification may be inferred from the acts

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*Shelly v. Governor*, Id. 289; *Beul v. Beck*, 3 Har. & McHen. 242; *Bacon v. Chesney*, 1 Stark. 192.

<sup>1</sup> 1 *Greenleaf's Ev.* § 187. See *White v. German Nat. Bank*, 9 Heisk. (Tenn.) 475; *Lee v. Brown*, 21 Kans. 458; *Rapier v. La. Equit. Life Ins. Co.* 57 Miss. 100.

<sup>2</sup> *Evans v. Beatties' Executor*, 5 Esp. 26.

<sup>3</sup> *McLaughlin v. McGovern*, 34 Barb. 208; *Story on Bills of Exch.* § 225.

<sup>4</sup> *Langan v. Hewett*, 13 S. & M. 122; *Andrews v. Planters' Bank*, 7 S. & M. 192.

<sup>5</sup> *Sweetser v. French*, 2 Cush. 309; *Hendric v. Berkowitz*, 27 Cal. 113.

or omissions of the partners after they knew, or had means of knowing, of the act of the individual partner.<sup>1</sup> The subsequent ratification of a partner's authority to bind the firm as sureties upon a note may always be proved by circumstantial evidence.<sup>2</sup>

In an action on a bond given for the purpose of obtaining a dissolution of an attachment of partnership property, in which all the partners are named as principals, but which was executed by one of them only, in the name of the firm, the plaintiff must prove, in order to recover against a surety in the bond, that the other partners assented to its execution.<sup>3</sup>

The right of a partner to sign the firm name to a contract of indemnity in favor of third persons, must be strictly proved, but it is not indispensable that it should be shown by written authority.<sup>4</sup>

SECTION 5.—*Defenses. Want of capacity of principal to contract.*

As a general rule, a surety may set up, in an action by the creditor against him, any legal or equitable defense which would have been available to his principal, and may introduce any evidence tending to maintain such defense.<sup>5</sup>

To this rule there are exceptions, for, as has been already shown, there are cases in which a guarantor or surety may be held liable where no suit whatever could be maintained on the original debt, and in which the guaranty was obtained, for the reason that the original debt could not be enforced at law.

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<sup>1</sup> Sweetser v. French, 2 Cush. 309.

<sup>2</sup> First National Bank v. Breese, 39 Iowa, 640.

<sup>3</sup> Russell v. Annable, 109 Mass. 72; S. C. 12 Am. R. 665.

<sup>4</sup> Moran v. Prather, 22 Wall. 492.

<sup>5</sup> See Jarratt v. Martin, 70 N. C. 459.

Thus, a surety or a guarantor will not be allowed to set up as a defense to an action on his contract, that at the time of the execution of the contract the principal was an infant or *feme covert*.<sup>1</sup> Nor will a guarantor of the payment of a bond assigned by him be permitted to defend an action on his guaranty, by showing that the makers of the bond were not competent to contract in the manner they did, by reason that the bond was issued by a corporation for a purpose not authorized by its charter. The guaranty of payment of the bond in such case imports an undertaking or agreement that the makers were competent to contract in the manner they have, and that the instrument is a binding obligation on them.<sup>2</sup>

SECTION 6.—*Denial of official capacity of principal, and defenses in actions on official bonds.*

Akin to the principles stated in the preceding section, are those governing defenses to actions against sureties in official bonds. A surety in an action on an official bond cannot successfully defend by showing that his principal was not lawfully in office.<sup>3</sup> Nor, where the ac-

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<sup>1</sup> Stillwell *v.* Bertrand, 22 Ark. 375; Kimball *v.* Newell, 7 Hill, 116; Davis *v.* Statts, 43 Ind. 103; Whitworth *v.* Carter, 43 Miss. 61; Erwin *v.* Downs, 15 N. Y. 576; McLaughlin *v.* McGovern, 34 Barb. 208; Dudley *v.* Witter, 51 Ala. 456; Weed Sewing Machine Co. *v.* Maxwell, 63 Mo. 486.

<sup>2</sup> Remsen *v.* Graves, 41 N. Y. 471; Zabriskie *v.* Cleveland, Columbia & Cincinnati R. R. Co., 23 How. (U. S.) 399.

<sup>3</sup> Mayor, &c. of Homer *v.* Merritt, 27 La. Ann. 568; State *v.* Rhoades, 6 Nev. 352; People *v.* Jenkins, 17 Cal. 500. It is enough to fix the liability of the sureties that their principal assumed to act although he never took the oath of office. Lyndon *v.* Miller, 36 Vt. 329; State *v.* Bates, 36 Vt. 387.

A surety on a guardian's bond cannot deny that his principal was lawfully appointed when his bond recites that fact; but where a guardian brings an action on the bond of a former guardian, the sureties in that bond may show that the plaintiff was not properly appointed, and, therefore, cannot maintain the action. Shroger *v.* Richmond, 16 Ohio St. 455.

tion is to recover for the default of the principal in paying over moneys collected by him in his official capacity, can they show that the moneys so collected were taxes illegally assessed.<sup>1</sup>

Where a bond is given by an officer and accepted before the forfeiture of the office is duly declared, the sureties therein will be estopped from pleading the non-performance of the statutory requirements by their principal.<sup>2</sup>

The sureties may show, in defense of an action based on the default of an officer in paying over moneys in his hand, any fact showing that they were not liable for such moneys, and that the act in respect to which default was made was not within the scope of their undertaking; as, for example, that the execution of the bond was subsequent to the default<sup>3</sup>; or that the moneys were not received by the principal in his official capacity;<sup>4</sup> or any matters which have occurred subsequent to the contract which are sufficient in law to effect a discharge of their liability on the contract. Mere defects in the form of a bond, if it is sufficient in substance and contains the proper conditions, will not vitiate it;<sup>5</sup> nor will a failure to insert the names of the sureties in the body of the bond defeat a recovery for a breach of it.<sup>6</sup> That the bond

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<sup>1</sup> *Mayor, &c. of Homer v. Merritt*, 27 La. Ann. 568. Defects in the warrant or tax-list will furnish no defense in an action on a collector's bond. *Orono v. Wedgewood*, 44 Me. 49; *Sandwich v. Fish*, 2 Gray (Mass.), 298.

<sup>2</sup> *State v. Cooper*, 53 Miss. 615.

<sup>3</sup> *Bissell v. Saxton*, 66 N. Y. 55; *Vivian v. Otis*, 24 Wis. 518; S. C. 1 Am. R. 199; *Inhabitants of Rochester v. Randall*, 105 Mass. 295; S. C. 7 Am. R. 519; *Bruce v. United States*, 17 How. (U. S.) 437; *Arlington v. Merricke*, 2 Saund. 403; *Hetten v. Lane*, 43 Texas, 279; *Paw-Paw v. Eggleston*, 25 Mich. 36; *Newman v. Metcalfe County Court*, 4 Bush. (Ky.) 67.

<sup>4</sup> *People v. Pennock*, 60 N. Y. 421; *Commonwealth v. Sommers*, 3 Bush. (Ky.) 555.

<sup>5</sup> *Boykin v. State*, 50 Miss. 375; *People v. Johr*, 22 Mich. 461; *Grocers' Bank v. Kingman*, 82 Mass. 473.

<sup>6</sup> *Stewart v. Carter*, Nev. 564.



was not dated, or was erroneously dated,<sup>1</sup> or had been altered by one who was its mere custodian;<sup>2</sup> or that the principal had filled a blank left for the date at the time of its execution;<sup>3</sup> or that the bond was for a larger amount than required by statute;<sup>4</sup> or that the condition was broader, and requires more than the statute under which it was given requires;<sup>5</sup> or that the bond was not approved as required by law,<sup>6</sup> are not good defenses to an action on the bond.

It will be a good defense, in an action against the sureties, that the officer was elected to an annual office,

<sup>1</sup> *Fournier v. Eyr*, 64 Me. 33.

<sup>2</sup> *State v. Berg*, 50 Ind. 496.

<sup>3</sup> *United States v. Halsted*, 6 Ben. 205.

<sup>4</sup> *State v. Rhoades*, 6 Nev. 352; *United States v. Hodson*, 10 Wall. 395; *M'Caraher v. Commonwealth*, 5 Watts & S. 21; *Governor v. Matlack*, 2 Hawks, 366; *Johnson v. Gwathoney*, 2 Bibb. 186; *Stevens v. Treasurers*, 2 M'Cord, 107; *Treasurers v. Bates*, 2 Bailey, 362. So, if the penalty of the bond is less than the statute prescribes. *Grimes v. Butler*, 1 Bibb. 192.

<sup>5</sup> *United States v. Hodson*, 10 Wall. 395. See *Polk v. Plummer*, 2 Humph. 500.

<sup>6</sup> *People v. Johr*, 22 Mich. 461; *State v. McAlpine*, 4 Ired. 140; *Stevens v. Treasurers*, 2 M'Cord, 107; *People v. Evans*, 29 Cal. 429. Where a city charter provides that all city officers, required to give bonds, shall file them within a certain time, and in case of default in so filing the bond, the person in default shall be deemed to have refused the office, or in case a bond filed should not be approved, and a satisfactory bond should not be filed within a certain time after disapproval, the person in default shall be deemed to have refused the office, and that the office should then be filled by appointment as in other cases; these provisions, as to the time of filing the bond, are to be regarded as directory merely, and not as mandatory. The municipal authorities are empowered, in their discretion, to declare a vacancy, or to waive the default as to the mere time of filing bond, and to accept and approve it when afterward filed. The mere default in that regard would not, of itself, operate to vacate the office. And in case the city authorities waived a default, the bond filed would be valid against the sureties. *Ross v. People*, 78 Ill. 375; *Rex v. Loxdale*, 1 Burr. 447; *Kane v. Footh*, 70 Ill. 590; *People v. Holly*, 12 Wend. 480; *State v. Churchill*, 41 Mo. 41; *State v. Porter*, 7 Ind. 204; and see *Kearney v. Andrews*, 2 Stockt. Ch. 70; *Speake v. United States*, 9 Cranch. 28; *State v. Toomer*, 7 Rich. (Law) 216; *Sprowl v. Lawrence*, 33 Ala. 674; *City of Chicago v. Gage*, decided Sept. 13, 1880, 22 Alb. L. J. 356.

and that the default giving the right of action occurred subsequent to the year for which they were bound.<sup>1</sup> And if the bond does not conform to the requirements of the statute, but is still good as a common law bond, it can only be enforced according to the rules of the common law;<sup>2</sup> and if the bond contains conditions unauthorized by law, this will be a good defense, so far as relates to a breach of the unauthorized conditions.<sup>3</sup>

That moneys collected by a public officer were lost or stolen, without fault of the officer, is no defense to an action on his bond.<sup>4</sup> It is a good defense to an action on the bond of a sheriff for his default, that the plaintiff is a co-surety with the defendants.<sup>5</sup> And it may also be a good defense that the surety, executing the bond, delivered the same conditionally, as, for example, upon the express condition that his act should not become operative until certain obligors named in the body of the instrument should also have executed the same.<sup>6</sup>

Sureties in an official bond cannot defend an action brought thereon by setting up some omission of duty by the obligee which was not directly owing to the sureties. Thus, while the law imposes upon a board of supervisors of a county the duty of examining the accounts of a county treasurer, it does not guarantee to the sureties the performance of that duty, or make the omission or negli-

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<sup>1</sup> *South Carolina Society v. Johnson*, 1 M'Cord, 41; *Bigelow v. Bridge*, 8 Mass. 275; *Commissioners v. Greenwood*, 1 Desaus. 450.

<sup>2</sup> *Branch v. Elliot*, 3 Dev. 86. By the statute of Tennessee a bond good at common law is a good statutory bond. *State v. Clark*, 1 Head. (Tenn.) 369.

<sup>3</sup> *Armstrong v. United States*, 1 Pet. C. C. 47; *United States v. Brown*, Gilpin, 155.

<sup>4</sup> *United States v. Prescott*, 3 How. (U. S.) 578; *United States v. Dashiell*, 4 Wall. (U. S.) 182. See *ante*, p. 166.

<sup>5</sup> *Mitchell v. Turner*, 37 Ala. 660.

<sup>6</sup> See *ante*, pp. 99, 209.

gent performance thereof a defense to an action on the bond.<sup>1</sup>

Under section 1884 of the New York Code of Civil Procedure, it is a defense by a surety, against whom an action is brought upon a sheriff's official bond, that he, or any other surety or sureties, have been or will be compelled, for want of sufficient property of the sheriff, to pay, upon one or more judgments recovered against him or them, upon the same bond, an aggregate amount, exclusive of costs, officers' fees, and expenses, equal to the sum for which the defendant is liable, by reason of the bond. It is a partial defense, that the difference between the aggregate amount so paid, or to be paid, and the sum for which the defendant is thus liable, is less than the amount of the plaintiff's demand.

By section 1889 of the same act, the above provision is made applicable to actions brought by the person injured upon the official bonds of surrogates, or of an officer acting as a surrogate, who is guilty of any actionable default or misconduct in his office ; or upon the official bond of a county treasurer, who has failed to obey the direction of the court, contained in the certified copy of an order or judgment served upon him, for the payment or delivery to the persons designated therein, any money, stocks, securities, or other investments held by him, subject to the direction of the court ; or upon the official bond of other public officers, including receivers, assignees of insolvent debtors, or trustees, or other officers appointed

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<sup>1</sup> Board of Supervisors *v.* Otis, 62 N. Y. 88. Mere *laches*, unaccompanied by fraud, as, for example, the neglect of the officers of a corporation to periodically examine the accounts of the treasurer, will not discharge the treasurer's sureties. Mutual Loan, &c. Association *v.* Price, 16 Fla. 204. Where the United States takes an official bond, it is not responsible for the *laches* or wrongful acts of its officers; and the obligors are conclusively presumed to execute it with full knowledge of this principle, and to consent to be dealt with accordingly. Hart *v.* United States, 95 U. S. 316.

by the court or a judge, who are required to give an official bond to the people ; and special provision is not made by law for the prosecution of the bond by, or for the benefit of, a person who has sustained an injury by their default, delinquency or misconduct for which the sureties in the bond are liable.

#### SECTION 7.—*Assigned demands.*

To the general rule that a surety or guarantor may set up, in an action brought by the creditor against him, any legal or equitable defense which would have been available to his principal, there is an exception embracing a class of cases in which the distinguishing feature is the fact that the defendant was, at one time, the owner of the principal obligation, and assigned it with the guaranty upon which he is sought to be charged. In such cases, whatever may be the rights of the principal, the guarantor is estopped from showing that the instrument is invalid. The law will not permit him to assign an invalid instrument ; to guaranty its payment or collection ; to receive the value ; and then, when sued upon his guaranty, assert that the original instrument is invalid. In such cases, the invalidity of the original contract is no defense.<sup>1</sup>

#### SECTION 8.—*Set-off, counter-claim, &c.*

It has been held, that a surety, when sued by his creditor on his contract, may plead and prove in his defense any set-off or counter-claim which would have been available to his principal had the action been brought against

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<sup>1</sup> *Remsen v. Graves*, 41 N. Y. 475 ; *Zabriskie v. Cleveland, Columbia & Cincinnati R. R. Co.* 23 How. (U. S.) 399 ; *Putnam v. Schuyler*, 4 Hun, 166 ; *Mann v. Eckford's Executors*, 15 Wend. 502 ; *Arnot v. Erie R. R. Co.* 5 Hun, 608 ; *Coggill v. American Exchange Bank*, 1 N. Y. 113.

him.<sup>1</sup> But this doctrine does not seem to be universally recognized. In New York, it is held that a surety, when sued upon his obligation, cannot avail himself of an independent cause of action existing against the plaintiff in favor of his principal, as a defense or counter-claim; that it is for the principal to determine what use he will make of such cause of action; and that the surety cannot control his decision.<sup>2</sup> If, however, the principal and surety are sued together, a successful recoupment by the principal will inure to the benefit of the surety, although the surety could not, if sued alone, avail himself of the defense.<sup>3</sup>

Where the principal has a valid claim against the creditor, and is insolvent, the surety will not be compelled to pay the claim and seek a doubtful remedy against his insolvent principal, but, on being sued on his contract, will be allowed, in equity, to prove the insolvency of his principal, and set-off the claim against the creditor.<sup>4</sup> But, in that case, the set-off is allowed only for the purpose of reducing the plaintiff's claim.<sup>5</sup>

In an action to foreclose a mortgage given as a security, for a joint bond executed by the mortgagor and another, as his surety, in which action both obligors are made defendants, and judgment is prayed against them for any deficiency, a debt due the mortgagor from the plaintiff may be set up by way of counter-claim.<sup>6</sup>

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<sup>1</sup> *Jarratt v. Martin*, 70 N. C. 459.

<sup>2</sup> *Lasher v. Williamson*, 55 N. Y. 619; *Morgan v. Smith*, 7 Hun, 244; S. C. 70 N. Y. 537; *Lewis v. McMillen*, 41 Barb. 420; *Henry v. Daley*, 17 Hun, 210. The cases in which a surety has been permitted, in the courts of New York, to set up, as a defense, matters personal to his principal, are such as show that the contract never had a valid existence, or that the liability created by it has been extinguished in whole or in part. *Henry v. Daley*, 17 Hun, 210.

<sup>3</sup> *Springer v. Dwyer*, 50 N. Y. 19; *Himrod v. Baugh*, 85 Ill. 435

<sup>4</sup> *Gillespie v. Torrance*, 25 N. Y. 306.

<sup>5</sup> *Morgan v. Smith*, 7 Hun, 244; S. C. 70 N. Y. 537.

<sup>6</sup> *Bathgate v. Haskin*, 59 N. Y. 533.

In Indiana, in an action on contract against two or more defendants, a claim in favor of one of the defendants may be pleaded by him as a set-off, if he alleges that he is the principal in the contract, and that his co-defendants are sureties therein, but not otherwise.<sup>1</sup> The sureties on the bond of a guardian, in an action on the bond, may plead, by way of set-off, an indebtedness of the relator to the guardian.<sup>2</sup> In an action on a promissory note given by principal and surety on a contract of the principal, it is competent to recoup the damages of the principal, growing out of the contract, to the same extent as if the note had been given by the principal, and he alone were sued.<sup>3</sup> So, under the Virginia Code, in an action of debt on a bond against the principal and two sureties, the principal may set-off a judgment recovered by a third party against the plaintiff and assigned to the principal.<sup>4</sup>

A note given by a principal and his surety may be set-off against a note running to the principal alone.<sup>5</sup>

Sureties cannot set-off a demand which their principal would not be entitled to set-off.<sup>6</sup>

In New York, a guarantor cannot set up, by way of set off, a claim distinct from that on which he is sued. The right of set-off, as distinguished from a defense arising upon the claim itself, belongs only to the principal debtor, and can be used only at his option.<sup>7</sup>

In an action on a promissory note against principal

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<sup>1</sup> *Harris v. Rivers*, 53 Ind. 216.

<sup>2</sup> *Myers v. State*, 45 Ind. 160.

<sup>3</sup> *Waterman v. Clark*, 76 Ill. 428. In a suit against the principal and his sureties, a debt due from the plaintiff to the principal may be set off. *Himrod v. Baugh*, 85 Ill. 435.

<sup>4</sup> *Wartman v. Yost*, 22 Gratt. 595.

<sup>5</sup> *Andrews v. Varrell*, 46 N. H. 17.

<sup>6</sup> *Gentry v. Jones*, 6 J. J. Marsh, 148.

<sup>7</sup> *Putnam v. Schuyler*, 4 Hun, 166; *Gillespie v. Torrance*, 25 N. Y. 306.

and surety, a demand due from the plaintiff to the principal may be set-off.<sup>1</sup> So, in an action against a principal and surety, on a bond given by them to executors, the defendant may set-off work done by one of them for the testator.<sup>2</sup> And, in an action against a principal and surety, on a joint bond, a separate demand of the principal may be pleaded as a set-off.<sup>3</sup>

Where an action is brought against the sureties on an administration bond, after the death of their principal, to recover the amount due the estate, the sureties cannot plead, as a set-off, an indebtedness of the intestate to the principal on the bond; nor a debt paid by the widow of the principal for which the intestate's estate was liable.<sup>4</sup>

#### SECTION 9.—*Matters in mitigation of damages.*

A surety, when sued upon his contract, may show matters in mitigation of damages, even though the principal does not defend. Thus, in an action by a sheriff upon a bond indemnifying him for a levy and sale under execution, where judgment has been recovered against him by a third person claiming the property sold, the sureties in the bond may show, under a general denial, in mitigation of damages, the amount received by the sheriff on the sale.<sup>5</sup>

So, in an action on a guardian's bond, the sureties may show, in mitigation of any recovery against them, disbursements or expenditures made by the guardian or the sureties in behalf of the ward.<sup>6</sup> But they cannot set

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<sup>1</sup> Mahurin v. Pearson, 8 N. H. 539.

<sup>2</sup> Crist v. Brindle, 2 Rawle, 121.

<sup>3</sup> Brundage v. Whitcomb, 1 Chip. 180.

<sup>4</sup> Vastine v. Dinan, 42 Mo. 269.

<sup>5</sup> O'Brien v. McCann, 58 N. Y. 373.

<sup>6</sup> Davenport v. Olmstead, 43 Conn. 67.

up as a defense, while the ward is yet a minor, that the guardian and ward have together squandered the estate. The consent or co-operation of the ward during the latter's minority, is no excuse for misappropriation.<sup>1</sup>

The sureties may attack a settlement made by their principal, admitting a certain amount to be in default, where the settlement is made without the notice and filing of an exhibit of accounts between himself and ward, as required by statute.<sup>2</sup>

#### SECTION 10.—*Extension of time of payment.*

A surety, when sued upon his contract, may plead as a defense that, since the execution of his contract, the creditor, with full knowledge of the existence of the suretyship, has for a good consideration, without the consent of the surety, entered into a binding contract with the principal debtor extending the time of payment of the debt for a definite time; and unless it appears that the surety has been indemnified by the principal debtor, or that the creditor, in extending the time of payment, reserved his remedies against the surety, the defense is perfect.<sup>3</sup>

#### SECTION 11.—*Laches of creditor.*

A surety cannot successfully plead, as a defense to an action to enforce his contract, a mere indulgence, delay, or passiveness on the part of the creditor towards the principal debtor, either in respect to direct proceedings against the principal or in the enforcement of collateral

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<sup>1</sup> Judge of Probate *v.* Cook, 57 N. H. 450. As to what may be shown in defense in an action on a guardian's bond in particular cases. *State v.* Hull, 53 Miss. 629; *Byrd v.* State, 44 Md. 492.

<sup>2</sup> *State v.* Hoster, 61 Mo. 544.

<sup>3</sup> See *ante*, p. 240; *Pomeroy v.* Tanner, 70 N. Y. 547.



securities which the principal has placed in his hands,<sup>1</sup> if the conduct of the creditor was not such as to amount to an omission of a duty which the surety had requested the creditor to perform.<sup>2</sup>

Laches of a creditor in proceeding against the principal debtor, may, however, be a good defense to a guarantor of the collection of the demand.<sup>3</sup> And an unreasonable delay on the part of the creditor in the commencement of legal proceedings against the principal, after a request by the surety that such proceedings be taken ; or a delay beyond the time fixed by statute, where the right to require the creditor to proceed against the principal is given by law, may also be a perfect defense to an action on other contracts of guaranty or suretyship.<sup>4</sup>

#### SECTION 12.—*Release of levy.*

Upon the same principle, the fact that the creditor, after recovering a judgment against the principal debtor, remains passive and neglects to enforce his judgment by execution, is not, in the absence of any direction to proceed, a good defense to an action against the surety.<sup>5</sup> Nor is it any defense that the creditor withdrew an execution placed by him in the hands of the sheriff if, in fact, no levy had been made under it.<sup>6</sup> But the rule would be

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<sup>1</sup> Clapton v. Spratt, 52 Miss. 251 ; Dillon v. Russell, 5 Neb. 484 ; Moore v. Gray, 26 Ohio St. 525 ; Wright v. Watt, 52 Miss. 634 ; Schroeppe v. Shaw, 3 N. Y. 446.

<sup>2</sup> Clark v. Sickler, 64 N. Y. 231.

<sup>3</sup> See *ante*, p. 139.

<sup>4</sup> See *ante*, p. 223 ; Martin v. Skehan, 2 Col. T. 614 ; Wilson v. Tebbetts, 29 Ark. 579 ; Harrison v. Price, 25 Gratt. 553.

<sup>5</sup> See *ante*, p. 230 ; Summerhill v. Tapp, 52 Ala. 227 ; Lumsden v. Leonard, 55 Ga. 374 ; Burr v. Boyer, 2 Neb. 265 ; Ormsby v. Fortune, 16 Serg. & R. 302.

<sup>6</sup> See *ante*, p. 232 ; Hetherington v. Branch Bank at Mobile, 14 Ala. 68 ; Forbes v. Smith, 5 Ired. Eq. 369 ; Union Bank of Tennessee v. Goran, 10

otherwise if, after an actual levy, the creditor released the levy and the surety had thereby suffered loss.<sup>1</sup>

SECTION 13.—*Alteration or merger of original contract.*

As has been stated, a material alteration of the contract by the creditor or principal debtor will discharge the surety, and, as a general rule, furnishes a perfect defense.<sup>2</sup> But it has been held that the surety cannot successfully defend an action against him by showing an alteration of the contract, unless the contract, as altered, is binding on his principal, and interferes with or impairs the rights of the surety by placing him in a different position from that he occupied before the contract was made.<sup>3</sup> And that an immaterial variation of the contract, or one that cannot, in any event, prejudice the surety, is no defense.<sup>4</sup> But it is well settled that when the alteration of the contract affects the time or manner of performance, the fact of the alteration furnishes a perfect defense, without regard to whether the alteration is beneficial or prejudicial to the surety, as that question depends upon circumstances which cannot always be judicially ascertained.<sup>5</sup>

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Smed. & M. 333; *Humphrey v. Hitt*, 6 Gratt. 509; *Lenox v. Prout*, 3 Wheat. 520.

<sup>1</sup> *Mayhew v. Crickett*, 2 Swanst. 193; *Cooper v. Wilcox*, 2 Dev. & Bat. Eq. 90; *Law v. East India Co.* 4 Ves. 829; *Smeed v. White*, 3 J. J. Marsh. 525.

<sup>2</sup> See *ante*, p. 260.

<sup>3</sup> *Claiborne v. Birge*, 42 Texas, 98; *Roach v. Simmons*, 20 Wall. 165. See *ante*, p. 260.

<sup>4</sup> *Hollier v. Eyre*, 9 Cl. & F. 1, 52; *Amicable Life Ins. Co. v. Sedgwick*, 110 Mass. 163; *Gardiner v. Harbick*, 21 Ill. 129.

<sup>5</sup> *Grant v. Smith*, 46 N. Y. 93; *Smith v. Rice*, 27 Mo. 505; *Toomer v. Dickenson*, 37 Ga. 428; *Mayhew v. Boyd*, 5 Md. 102. See *ante*, p. 260. It is well settled law in New York, that any material change in the contract entered into by the surety, if made without his assent, discharges him from further liability; and that it is unimportant whether the alteration be beneficial or prejudicial to him, or whether it was made before or after the obligation matured. *Church v. Howard*, 17 Hun, 5. See *ante*, p. 260.

SECTION 14.—*Statute of limitations.*

After the time fixed by statute for the enforcement by action of claims or demands of the same nature as those for which a surety or guarantor is bound has elapsed, the statute of limitations will be a valid defense to an action on the contract of the surety or guarantor, unless facts exist by which the case is taken out of the operation of the statute.

It was settled in England prior to Lord Tenterden's Act, and the Mercantile Law Amendment Act, of 1856, that part payment by one of two or more joint and several makers of a note, was sufficient to prevent the bar of the statute of limitations, without regard to whether such payment was made before or after the statute had attached.<sup>1</sup>

This doctrine is stated by Lord Ellenborough to have had its origin with the case of *Whitcomb v. Whiting*,<sup>2</sup> in which Lord Mansfield said the payment by one is payment for all, the one acting virtually for the rest; and in the same manner, an admission by one is an admission by all, and the law raises the promise to pay when the debt is admitted to be due.

In this country the decisions are conflicting. In some of the States the English rule is fully recognized and adopted, whilst in others the courts hold that no such authority can be fairly implied from the relation of joint debtors, and that a payment by one of several joint makers cannot, in any manner, operate to bind the others. The English rule has been followed in New England (with the exception of New Hampshire), and in

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<sup>1</sup> *Parham v. Raynal*, 3 Bing. 306; *Wyatt v. Hodson*, 8 Bing. 309; *Rew v. Pettet*, 1 Ad. & E. 196; *Burleigh v. Scott*, 8 B & C. 36; *Channell v. Ditchburn*, 5 M. & W. 494.

<sup>2</sup> Doug. 652.

the majority of the States;<sup>1</sup> but has been repudiated in the Supreme Court of the United States, in New Hampshire, South Carolina, Tennessee, Indiana, Delaware, and Pennsylvania.<sup>2</sup>

In Maryland, it is held that the payment by the principal, year by year, of the interest on a joint and several promissory note, will prevent the operation of the statute of limitations in favor of a surety to the note.<sup>3</sup> In that State, and several others, a distinction is recognized between a payment made by one of several joint makers, before the statute had attached, and one made subsequent thereto; and it is held that where the payment is made before the statute attached, it takes the note out of the operation of the statute, but not so if the note had become barred before the payment.<sup>4</sup>

In New York it is held that there is no mutual agency between joint debtors, by reason of their joint contract, which will authorize one to act for and bind the others, so as to vary their liability;<sup>5</sup> and that neither an acknowledgment nor the part payment by a maker or surety of a joint and several promissory note will affect the right of

<sup>1</sup> *Frye v. Barker*, 4 Pick. 382; *Joslyn v. Smith*, 13 Vt. 353; *Caldwell v. Sigourney*, 19 Conn. 37; *Turner v. Ross*, 1 R. I. 88; *Shelton v. Cocke*, 3 Mumf. 240; *Beitz v. Fuller*, 1 McCord, 541; *Davis v. Coleman*, 7 Ired. 424; *Beardsley v. Hall*, 36 Conn. 270; S. C. 4 Am. R. 74.

<sup>2</sup> *Exter Bank v. Sullivan*, 6 N. H. 124; *Stelle v. Jennings*, 1 McMullin, 297; *Belate's Ex. v. Wynne*, 7 Yerger, 534; *Muse v. Donelson*, 2 Humph. 166; *Dickerson v. Turner*, 12 Ind. 223, 239; *Lowther v. Chappell*, 8 Ala. 353; *Levy v. Cadet*, 17 S. & R. 126; *Searight v. Craighead*, 1 Penn. 135; *Trate v. Baron*, 24 Miss. 156; *Palmer v. Dodge*, 4 Ohio N. S. 21, 36; *Bush v. Stowell*, 71 Penn. St. 208; S. C. 10 Am. R. 694.

<sup>3</sup> *Schindel v. Gates*, 46 Md. 604; S. C. 24 Am. R. 526.

<sup>4</sup> *Id.*; *Ellicott v. Nichols*, 7 Gill. 86; *Seeley v. Seeley*, 2 Hill, 496; *Stelle v. Jennings*, 1 McMullan, 297; *Goudy v. Gillman*, 6 Rich. 28; *McIntyre v. Oliver*, 2 Hanks, 209; *Walton v. Robinson*, 6 Ired. 341; *Emmons v. Overton*, 18 B. Mon. 643.

<sup>5</sup> *Winchell v. Hicks*, 18 N. Y. 558; *Van Kenren v. Parmelee*, 2 N. Y. 523; *Shoemaker v. Benedict*, 11 N. Y. 176.

another surety who took no part in the transaction;<sup>1</sup> nor will the part payment by a surety revive the demand against the principal, unless made at the express request of the principal.<sup>2</sup>

In Alabama, the statute declares that "no act, promise, or acknowledgment is sufficient to remove the bar to a suit, or is evidence of a new and continuing contract, except the partial payment made upon the contract by the party sought to be charged, before the bar is complete, or an unconditional promise in writing, signed by the party to be charged thereby."<sup>3</sup> In that State, it is held that an admission made by the maker of a note, coupled with a promise to pay, will not revive the debt so as to take it out of the bar of the statute, as against a co-maker who is a surety, nor will payments made by him have the effect of removing the bar of the statute.<sup>4</sup>

In some of the States, under the peculiar wording of the Sunday laws, a part payment made upon the Lord's day will not take a debt out of the operation of the statute,<sup>5</sup> while in other States the opposite rule is adopted.<sup>6</sup>

In Ohio, a partial payment by one of several makers on a joint and several promissory note will not prevent the running of the statute as to the other makers.<sup>7</sup>

In respect to guarantors of promissory notes, it has been held, that the acknowledgment of the debt or part

<sup>1</sup> *Winchell v. Hicks*, 18 N. Y. 558; *Church v. Howard*, 17 Hun, 5.

<sup>2</sup> *Id.*; *Harper v. Fairley*, 53 N. Y. 442, 445. This is also held in Louisiana. *Succession of Voorhies*, 21 La. Ann. 659.

<sup>3</sup> Rev. Code, § 2914.

<sup>4</sup> *Knight v. Clements*, 45 Ala. 89; s. c. 6 Am. R. 693; *Lowther v. Chapell*, 7 Ala. 353. See *Myatts v. Bell*, 41 Id. 222.

<sup>5</sup> *Clapp v. Hale*, 112 Mass. 368; s. c. 17 Am. R. 111. See *Haydock v. Tracy*, 3 Watts & Serg. 507.

<sup>6</sup> *Beardsley v. Hall*, 36 Conn. 270; s. c. 4 Am. R. 74; *Thomas v. Hunter*, 29 Md. 406.

<sup>7</sup> *Hance v. Hair*, 25 Ohio St. 349.

payment by the maker, will not affect the rights or obligations of collateral parties.<sup>1</sup>

In some States, it has been held, as has been stated, that a promise to pay a note, made within the time limited by the statute, by the maker, will take it out of the statute, as against the surety.<sup>2</sup> In other States the opposite rule has been adopted.<sup>3</sup>

A partial payment of a promissory note by a surety after the right of action has been barred by the statute, does not revive the liability of the surety for the debt.<sup>4</sup>

There is a want of uniformity in the statutes of the several States, which prevents the statement of any general rule as to the right of the surety to plead the statute of limitations as a defense to an action on his contract. The effect of absence, coverture, infancy, or other disability of the parties, the length of time which must elapse before the statute creates a bar, and the acts which will prevent the operation of the statutes as well as the requirements as to the manner in which such acts shall be evidenced to be of any effect, all depend, to a great extent, on the statutes of each particular State.

#### SECTION 15.—*Statute of frauds.*

A slight examination of the authorities will show, that one of the defenses most frequently interposed by sureties and guarantors, to actions on their contracts, is the alleged invalidity of the contract sued upon, by reason of its failure to conform to the requirements of the statute of frauds. This defense has never been favored by

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<sup>1</sup> Gardiner v. Nutting, 5 Greenl. 140; Root v. Bradley, 1 Kans. 437.

<sup>2</sup> Frye v. Barker, 4 Pick. 382; Lawrence County v. Dunkle, 35 Mo. 395; Whitaker v. Rice, 9 Min. 13.

<sup>3</sup> Hunter v. Robertson, 30 Ga. 479; Borden v. Peay, 20 Ark. 293.

<sup>4</sup> Emmons v. Overton, 18 B. Mon. (Ky.) 643.

the courts, but has found more favor when interposed in actions against persons standing in the position of guarantors or sureties, than when interposed in actions against parties who have received the benefit of the contract they are seeking to evade.

A guarantor may successfully defend an action brought upon his oral undertaking, upon the ground that it was not in writing, when the action is based upon a guaranty of the payment of a note of the third person, given in payment of a debt of the guarantor,<sup>1</sup> or upon a promise made to the vendor of chattels that, if he will deliver the goods to another, the promissor will see that the vendor gets his pay, and the delivery is made on the faith of the promise ; but the credit is not given exclusively to the promisor,<sup>2</sup> or upon a promise by the defendant, on behalf of several others, that, if the plaintiff would render certain services for them, they would pay him, and that the defendant would see him paid ;<sup>3</sup> or upon a promise to be responsible and stand good for the payment by another of wages that may accrue from the latter to the plaintiff ;<sup>4</sup> or upon a promise to pay a sub-contractor a sum due him from a contractor for work, out of what may be due such contractor for work done for the defendant ;<sup>5</sup> or upon a promise to pay the debt of another, if not paid by himself ;<sup>6</sup> or upon a promise to hold the surety in a replevin

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<sup>1</sup> *Dows v. Sweet*, 120 Mass. 322.

<sup>2</sup> *Pettit v. Braden*, 55 Ind. 201 ; *Bloom v. McGrath*, 53 Miss. 249 ; *Boykin v. Dohlond*, 1 Ala. 502. But the statute is no defense where the sale was made wholly on the authority and credit of the promisor. *McLendon v. Frost*, 57 Ga. 448.

<sup>3</sup> *Hall v. Woodin*, 35 Mich. 67.

<sup>4</sup> *Miller v. Neihaus*, 51 Ind. 401. But the statute is no defense in an action upon an agreement by *A.* to pay *B.* for work to be done for *C.* *Sinclair v. Bradley*, 52 Mo. 180.

<sup>5</sup> *Laidlow v. Hatch*, 75 Ill. 11.

<sup>6</sup> *Gillfillan v. Snow*, 51 Ind. 305.

bond harmless;<sup>1</sup> or upon an engagement to indemnify sureties against loss or liability;<sup>2</sup> or upon the promise of the purchaser of the equity of redemption made after the purchase, upon a valuable consideration, to pay the mortgage debt;<sup>3</sup> or upon the promise of a mortgagee of a part of a vessel to pay for supplies furnished the vessel, if the plaintiff would not attach the interests of the other part owners;<sup>4</sup> or upon the promise of an individual member of a firm to give his personal guaranty for the performance of a contract by his firm;<sup>5</sup> or upon a promise by a wife to pay a joint bond of herself and husband, when such bond is void as to her;<sup>6</sup> or upon the promise of a forwarder of goods to the carrier to pay any draft on himself by the consignee for the transportation;<sup>7</sup> or upon a promise to pay an existing debt, if the debtor does not.<sup>8</sup> And, generally speaking, the statute of frauds is a good defense in an action on an oral promise, when the promise is what the law terms collateral and not original,<sup>9</sup> the difficulty in determining whether the defense is available arising out of the uncertainty as to the construction which the court will put upon the contract. The question as to whether the contract is original or collateral is

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<sup>1</sup> *Bissig v. Britton*, 59 Mo. 204; S. C. 21 Am. R. 379; *Easter v. White*, 12 Ohio St. 219; *Green v. Creswell*, 10 Ad. & El. 453.

<sup>2</sup> *First National Bank v. Bennett*, 33 Mich. 520.

<sup>3</sup> *Berkshire v. Young*, 45 Ind. 461.

<sup>4</sup> *Ames v. Foster*, 106 Mass. 400.

<sup>5</sup> *Smith v. Bowler*, 2 Disney (Ohio), 153.

<sup>6</sup> *Guishaber v. Hairman*, 2 Bush (Ky.), 320.

<sup>7</sup> *Wakefield v. Greenhood*, 29 Cal. 597.

<sup>8</sup> *Dufolt v. Gorman*, 1 Minn. 301; *Britton v. Thraikill*, 5 Jones Law (N. C.), 329; *Eddy v. Roberts*, 17 Ill. 505.

<sup>9</sup> *Walker v. Richards*, 39 N. H. 259; *Hetfield v. Dow*, 3 Duch. (N. J.), 440; *Benson v. Walker*, 5 Harring. (Del.), 110; *Steele v. Towne*, 2 Wms. (28 Vt.), 771; *Perkins v. Goodman*, 21 Barb. 218; *Kurtz v. Adams*, 7 Eng. 174.



to be determined, not by the language used, but upon all the evidence in the case.<sup>1</sup>

In some of the States, as has been stated, the promise to answer for the debt, default or miscarriage of another will not be binding on the promisor, unless evidenced by a writing signed by the party to be charged, or his authorized agent, and expressing the consideration. In other States, the contract need not express the consideration.<sup>2</sup>

#### SECTION 16.—*Infancy or coverture.*

As has been stated, the fact that the principal debtor was, at the time of entering into the principal contract, either an infant or a married woman, is no defense to a surety or guarantor.<sup>3</sup>

But where the surety or guarantor were under the disability of infancy or coverture at the time of the execution of their contract, this may be a valid defense.

Under the laws of some of the States, a married woman may bind herself, as a surety or guarantor, by an instrument in writing *creating a charge upon her separate estate*, but not otherwise.<sup>4</sup> And, under the well known and undisputed principles of law, an infant may disaffirm a contract of this nature at any time before coming of age; or, if sued on his contract after his majority, may plead his infancy as a defense, unless he has, since becoming of age, ratified the contract.

#### SECTION 17.—*Impossibility of performance.*

It is a well-settled principle that, when a party has, by an express contract, unqualifiedly bound himself to do a

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<sup>1</sup> *Blank v. Dreher*, 25 Ill. 331.

<sup>2</sup> See *ante*, p. 84.

<sup>3</sup> See *ante*, p. 148.

<sup>4</sup> *Gosman v. Cruger*, 69 N. Y. 87.

certain thing, he cannot defend an action brought upon his contract, by showing that the performance of the contract became impossible through inevitable accident, the act of God or the public enemy.<sup>1</sup> This rule has been uniformly followed, even in cases in which its application has been considered by the court as attended with great hardship. And it has been said, that the only exception which has ever been acknowledged is where a party has contracted to do a thing which the law considers impossible.<sup>2</sup>

But this principle is too strongly stated. In all criminal cases where a party accused of a crime is liberated on bail, the principal and sureties bind themselves that the principal shall appear before the court at the time and place appointed, and answer to the crime charged against him. The form of the recognizance is without reservation or condition, but the law excuses the sureties if they are prevented by the act of God, or by the act of the law, or by the act of the obligee, from fulfilling the requirements of the bond.<sup>3</sup>

Thus, it is a good defense to an action against the sureties on a forfeited recognizance, that, at the time when the principal should have appeared to answer the charge against him, he was dead,<sup>4</sup> sick,<sup>5</sup> or detained by the military authorities of the United States,<sup>6</sup> and for

<sup>1</sup> *Steele v. Buck*, 61 Ill. 343; S. C. 14 Am. R. 60; *Kingsbury v. Westfall*, 61 N. Y. 356.

<sup>2</sup> *Harmony v. Bingham*, 12 N. Y. 99, 108; Co. Lit. 206*b*.; *Shep. Touch.* 164; *Beebe v. Johnson*, 19 Wend. 500.

<sup>3</sup> *Taintor v. Taylor*, 36 Conn. 242; S. C. 4 Am. R. 58.

<sup>4</sup> See *State v. Cone*, 32 Ga. 663; *Steelman v. Mattix*, 9 Vroom (N. J.), 247.

<sup>5</sup> *Scully v. Kirkpatrick*, 79 Penn. St. 324; S. C. 21 Am. R. 62; *People v. Manning*, 8 Cow. 297; *People v. Tubbs*, 37 N. Y. 586.

<sup>6</sup> *People v. Cook*, 30 How. (N. Y.) 110; *People v. Cushney*, 44 Barb. 118. But see *ante*, p. 282.

that reason could not be produced by them at the appointed time and place.

So, in an action on a replevin bond conditioned for the delivery of an animal taken under replevin process, the surety may plead the death of the animal, and his consequent inability to deliver her, as a defense to an action on the bond.<sup>1</sup>

The fact that an officer, who has given a bond with sureties, for the faithful performance of the duties of his office, is prevented from paying over funds collected by him, by reason of their having been feloniously taken from his possession without fault on his part, is no defense in an action on his bond.<sup>2</sup> Neither is the fact that a vessel has been destroyed by the act of God a defense to an action on a bond conditioned for her return, in good order, within a specified time.<sup>3</sup>

#### SECTION 18.—*Fraud in obtaining the contract.*

The liability of a surety on a contract into which he has been induced to enter by acts which the law terms fraud, has been considered in a previous chapter, as well as the character of the acts which, in law, will amount to fraud.

In an action against the surety on his contract it will be a good defense to show that the surety was induced to enter into the contract by reason of the misrepresentations of a material fact by the plaintiff, or by the principal debtor, in the presence, or with the knowledge and assent of, the plaintiff; or that some material fact affecting the risk was concealed from the surety at the time of

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<sup>1</sup> *Carpenter v. Stevens*, 12 Wend. 589.

<sup>2</sup> See *ante*, p. 158.

<sup>3</sup> *Steele v. Buck*, 61 Ill. 343.

entering into the contract, which, if disclosed, might have prevented its execution,<sup>1</sup> unless the surety subsequently, with full knowledge of all the facts, has, by some affirmative act, affirmed his contract and waived his defense.<sup>2</sup>

But, if the plaintiff had no knowledge of the fraud, and was in no sense a party to it, the fact that the surety was induced to enter into his contract by reason of the fraud of others, will be no defense;<sup>3</sup> nor will it be any defense that the plaintiff failed to disclose to the surety the nature and extent of the obligation he was assuming, and that the surety was ignorant of the legal effect of his contract.<sup>4</sup> A concealment of material facts, affecting the risk, after the execution of the contract, may amount to such a fraud upon the rights of the surety as to be a valid defense in an action seeking to charge him for any default of his principal committed after the surety became entitled to knowledge of the facts.<sup>5</sup> Thus, as has been shown, the fact that the principal has from time to time, with the knowledge of his employer, been guilty of embezzlement of his employer's funds, and yet has been retained in a fiduciary capacity, will be a good defense to an action on a bond conditioned for the faithful discharge of the duties of the principal, as to breaches of the condition of the bond occurring after the employer had such knowledge, and should have communicated the facts to the surety.<sup>6</sup>

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<sup>1</sup> *Easter v. Minard*, 26 Ill. 494; *Young v. Ward*, 21 Ill. 223; *Graves v. Lebanon Nat. Bank*, 10 Bush (Ky.), 23; S. C. 19 Am. R. 50; *Lee v. Jones*, 14 C. B. (N. S.) 322; 13 W. R. (Exch.) 318; 17 C. B. (N. S.) 482. See *ante*, p. 293.

<sup>2</sup> *Rindskopf v. Doman*, 28 Ohio St. 516.

<sup>3</sup> *Casoni v. Jerome*, 58 N. Y. 315; *McWilliams v. Mason*, 31 N. Y. 294; *Anderson v. Warne*, 71 Ill. 20; S. C. 22 Am. R. 83. See *ante*, p. 293.

<sup>4</sup> See *ante*, p. 293; *Western N. Y. Life Ins. Co. v. Clinton*, 66 N. Y. 326.

<sup>5</sup> See *ante*, p. 296.

<sup>6</sup> See *ante*, p. 297.

SECTION 19.—*Want of notice.*

In some States, it is a valid defense to an action on a contract of guaranty, that the guarantor received no notice of an acceptance of the guaranty,<sup>1</sup> or of the default of the principal before the commencement of the action, or within a reasonable time after such default.<sup>2</sup> In these States, the defense is available only when the guaranty relates to future advances, credits, or payments,<sup>3</sup> and is not available when the guaranty sued upon is absolute in its terms, and definite as to amount and extent.<sup>4</sup> Thus, the want of notice of the default of the principal debtor, is no defense to an action on a guaranty of a specific existing demand, as a promissory note, or other evidence of debt;<sup>5</sup> nor is the want of notice of acceptance of the guaranty a defense in such case.<sup>6</sup>

In other States, the want of notice of the default of the principal debtor, will, as a general rule, be no defense in an action against the guarantor,<sup>7</sup> the courts holding that his liability is commensurate with that of his principal, and that the guarantor is no more entitled to notice of default than the person whose act he has guaranteed.

<sup>1</sup> *Montgomery v. Kellogg*, 43 Miss. 486; S. C. 5 Am. R. 508; *Central Savings Bank v. Shine*, 48 Mo. 456; S. C. 8 Am. R. 112; *McCollum v. Cushing*, 22 Ark. 540. See *ante*, p. 194.

<sup>2</sup> *Montgomery v. Kellogg*, 43 Miss. 486; *Gaff v. Sims*, 45 Ind. 262. See *ante*, p. 200.

<sup>3</sup> *Id*; *Mayfield v. Wheeler*, 37 Texas, 256. See *Burrell v. Clarke*, 7 Cranch, 69; *Edmundson v. Drake*, 5 Pet. 629; *Douglass v. Reynolds*, 7 Pet. 113; *Lee v. Dick*, 10 Pet. 482; *Adams v. Jones*, 12 Pet. 207; *Reynolds v. Douglass*, 12 Pet. 497. *Ante*, p. 201.

<sup>4</sup> *Montgomery v. Kellogg*, 43 Miss. 486. *Ante*, p. 197.

<sup>5</sup> *Thrasher v. Ely*, 2 S. & M. 147; *Barker v. Scudder*, 56 Mo. 272; *Greene v. Thompson*, 33 Iowa, 293; *Bowman v. Curd*, 2 Bush (Ky.), 565.

<sup>6</sup> *Davis Sewing Machine Co. v. Jones*, 61 Mo. 409; *Sanders v. Etcherson*, 36 Ga. 404.

<sup>7</sup> *Gage v. Lewis*, 68 Ill. 604. See *ante*, p. 200. Under the Iowa Code, a guarantor by a non-negotiable written contract is not entitled to notice before suit brought. *Henderson v. Booth*, 11 Iowa, 212.

The right to notice of acceptance may be waived by a subsequent recognition of liability and a promise to make it good,<sup>1</sup> and in such case want of notice is no defense. So, the utter insolvency of the principal debtor at the time when the debt became due, may be a valid excuse for want of notice of his default, and in such case the want of notice of such default will be no defense.<sup>2</sup> And generally, where the guarantor has not been prejudiced by the want of notice, the absence of notice is no defense.<sup>3</sup> The absence of *express* notice will be no defense, if, from all the circumstances of the case actual notice can be implied.<sup>4</sup>

How far a person signing an instrument as a surety or guarantor has an absolute right to require notice of his principal's default as a condition of his liability has been considered elsewhere.

#### SECTION 20.—*Defects in execution. &c.*

In actions on bonds, and especially on official bonds, defects in the execution, acknowledgment, or approval of the instrument in suit, are frequently relied upon as a defense. As a general rule, one who has signed, sealed, and delivered an instrument as his deed, will not be heard to question its validity upon the ground that it was not acknowledged by him, nor proved at the time of the delivery. It is the sealing and delivery that gives efficacy to the instrument, and not proof of its execution; and this principle is applied to all bonds, whether exe-

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<sup>1</sup> Farwell *v.* Sully, 38 Iowa, 387; Central Savings Bank *v.* Shine, 48 Mo. 456; s. c. 8 Am. R. 112; Trefethen *v.* Locke, 16 La. Ann. 19.

<sup>2</sup> Janes *v.* Scott, 59 Penn. St. 178; Waller *v.* Forbes, 31 Ala. 9.

<sup>3</sup> Vinal *v.* Richardson, 13 Allen (Mass.), 521. See Keith *v.* Dwinnell, 38 Vt. 286; Paige *v.* Parker, 8 Gray (Mass.), 211; Salem Manufacturing Co. *v.* Brower, 4 Jones Law (N. C.), 429.

<sup>4</sup> See *ante*, p. 205.

cuted by public officers or private persons, unless there is some statute making the acknowledgment or proof in suit essential to the validity of the instrument.<sup>1</sup>

If a blank paper is signed and sealed by one person as principal, and by others who intend to be his sureties, and is left with the principal to be filled up, the persons signing as sureties, may show these facts in their defense in an action on the bond brought by the obligee named therein, to whom it was delivered by the principal in its completed state, although the principal could not urge these facts as a defense.<sup>2</sup> In all such cases the general rule applies, that a paper signed and sealed in blank, with verbal authority to fill it up, is void as to the persons so signing and sealing it, unless they afterwards deliver, or acknowledge and adopt it.<sup>3</sup>

If the bond is signed by the sureties only, and not by the person named therein as principal, this will be a valid defense to an action against them on the instrument.<sup>4</sup>

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<sup>1</sup> *Supervisors of Washington Co. v. Dunn*, 27 Gratt. (Va.) 607. See, also, *Commonwealth v. Lamb*, 1 Watts & Serg. 261. *Ante*, p. 156. A statutory bond must conform substantially to the requirements of the statute in respect to its penalty, form, conditions and number of sureties. If the statute requires two sureties, and the bond is executed by one only, the surety may insist on the defect as a defense, unless he has waived the defect. *Cutler v. Roberts*, 7 Neb. 4. See *Gregory v. Cammeron*, 7 Neb. 414.

<sup>2</sup> *Penn v. Hamlett*, 27 Gratt. (Va.) 337. But see *Wright v. Harris*, 31 Iowa, 272.

<sup>3</sup> *Gilbert v. Anthony*, 1 Yerg. 69; *Wynne v. Governor*, 1 Yerg. 149; *Byers v. M'Canahan*, 6 Gill & J. 250; *Perminster v. M'Daniel*, 1 Hill, 267; *Boyd v. Boyd*, 2 N. & M. 125; *United States v. Nelson*, 2 Brock. 64; *Ayres v. Harness*, 1 Ham. 368; *M'Kee v. Hicks*, 2 Dev. 379. But see *Bartlett v. Board of Education*, 59 Ill. 367.

<sup>4</sup> *Wood v. Washburn*, 2 Pick. 24; *Bean v. Parker*, 17 Mass. 591; *Russell v. Annable*, 109 Mass. 72; S. C. 12 Am. R. 665. But see *State v. Bowman*, 10 Ohio, 445. But it is no defense that the sureties were not named in the body of the instrument, if, they in fact, signed and sealed it. *Martin v. Dortch*, 1 Stew. 479; *Williams v. Greer*, 4 Hayw. 239; *Campbell v. Campbell*, Brayt. 38; *Stone v. Wilson*, 4 M Cord, 203; *Fulton's Case*, 7 Cow. 484; *Smith v.*

The sufficiency of the subscription to the contract under the statute of frauds, has been considered elsewhere.

SECTION 21.—*Surrender, &c. of securities.*

If the creditor, after taking securities for his debt from the principal debtor, has released, impaired, or surrendered them, the surety may, as a general rule, plead this act as a defense to an action on his contract, and reduce the amount of the recovery according to the value of the securities wasted.

The effect of a surrender of securities by the creditor to the debtor, or of a misapplication of the proceeds thereof, has been sufficiently considered.<sup>1</sup>

SECTION 22.—*Want of delivery.*

As a general rule, a bill, bond, or note has no legal inception until it has been delivered by the obligors with intention that it shall take effect;<sup>2</sup> and if it can be clearly shown that a note, or other obligation came into the hands of a third person without any delivery, or without such acts on the part of the persons signing the obligation as will be equivalent in law to an actual delivery, this will be a good defense to an action on the obligation.<sup>3</sup>

There can be no doubt as to the legal effect of an absolute unconditional delivery of a contract. But, when

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Crooker, 5 Mass. 538; Danker v. Attwood, 119 Mass. 146; Fournier v. Cyr, 64 Me. 32; Scheid v. Leibshultz, 51 Ind. 38; Stewart v. Carter, 4 Neb. 564. But if the name of the surety is written by him in the body of the bond, but the instrument is not subscribed or sealed by him, he may defend an action on the bond on this ground. Wild Cat Branch v. Ball, 45 Ind. 213.

<sup>1</sup> See *ante*, p. 237.

<sup>2</sup> Adams v. Jones, 12 Ad. & Ell. 455; Catlin v. Gunter, 11 N. Y. 368; Wild Cat Branch v. Ball, 45 Ind. 213; McPherson v. Week, 30 Mo. 345.

<sup>3</sup> Carter v. McClintock, 29 Mo. 464.



a contract, signed by many parties, passes from hand to hand in the process of execution, and its delivery from one to another is coupled with conditions and attempted limitations as to the manner of its final completion, or as to when the instrument shall take effect as the obligation of the party signing it, the question of how far a party to the instrument can defend an action brought against him thereon on account of an alleged failure of the person to whom it was delivered, to comply with the conditions on which the delivery was made, depends on so many circumstances that it cannot be answered by applying any general rule. Thus, when at the time of delivering promissory notes to a third person, for the benefit of the payee, the maker declares the delivery to be unconditional, such declaration is a part of the *res gesta*, and makes the act of delivery absolute. But, when the notes are signed by two persons, one a principal debtor and the other a surety, such declaration and delivery by the principal debtor is not enough to entitle the payee to maintain an action on the notes against the surety and indorsers. If it appears that the notes were signed by the maker, together with a surety, and indorsed by another person, on the express condition that they should not take effect until a certain arrangement should be consummated, the absolute delivery of the notes by the maker is an unlawful diversion of them from the purpose for which they were made and indorsed, and the payee will obtain no title to them unless he is a *bona fide* purchaser for value paid, and without notice.<sup>1</sup>

On the other hand, it is held that an agreement between a principal and surety, to the effect that the former should not deliver the bond until he had obtained the

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<sup>1</sup> *Mickles v. Colvin*, 4 Barb. 304.

signature of another person thereon as a co-surety, and the delivery of the bond without such signature contrary to such agreement, will not be a defense in an action against the surety, where there was nothing on the face of the bond or in the attending circumstances to apprise the obligee that a further signature was necessary to complete the instrument.<sup>1</sup> So it is held that although some of the sureties in a bond sign and deliver it to the principal, upon the express understanding that it is not to be delivered as their bond until other persons named therein have signed it, the delivery of the bond by the principal without such additional signatures, is no defense to an action on the instrument, if the obligee is not chargeable with notice of such understanding.<sup>2</sup> But if the obligee had notice of the conditional delivery, this would be a good defense in an action against the surety.<sup>3</sup>

There is a class of cases, in which bonds and other obligations have been executed by sureties, with the understanding or expectation that other persons should also execute the instrument as additional sureties, but in which the sureties actually signing the instrument gave no direction to the principal not to deliver the instrument until it should be signed by such other persons. In these cases, the delivery of the bond in direct opposition to such understanding or expectation to an obligee named therein, who had no actual knowledge, or notice sufficient to put him on inquiry, is no defense to an action on the instrument.<sup>4</sup>

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<sup>1</sup> *State v. Potter*, 63 Mo. 212; 21 Am. R. 440.

<sup>2</sup> *Tidball v. Halley*, 48 Cal. 610; *Nash v. Fugate*, 24 Gratt. 202; S. C. 18 Am. R. 640.

<sup>3</sup> *United States v. Hammund*, 4 Biss. 283; *Leaf v. Gibbs*, 4 C. & P. 466; *Ayers v. Milroy*, 53 Mo. 516; S. C. 14 Am. R. 465; *Bronson v. Noyes*, 7 Wend 188.

<sup>4</sup> *Russell v. Freer*, 56 N. Y. 67; *State v. Gorton*, 32 Ind. 1.

The cases hold that where the names in the body of the bond were written by the justice who took the acknowledgments of those who executed it, and by whom the oath to justification was administered, there is nothing in the fact that the name of a person who did not execute the instrument was inserted therein and erased, is not sufficient to put the obligee on inquiry why the bond was not executed by him.<sup>1</sup>

And it has also been held in a number of cases, that where a surety signs a bond, and delivers it to the principal obligor upon the express condition that it shall not be delivered to the obligee until it has been executed by another co-surety therein named, and the principal, nevertheless, delivers it to the obligee in disregard of the conditions, the obligee has the right to presume, in the absence of notice, that the surety had conferred full authority to deliver the bond.<sup>2</sup> The courts are latterly holding, with considerable uniformity, that where persons by executing a bond and leaving it with the principal, place it in his power to deliver it as a valid and complete instrument, and he does so deliver it and induce the obligee to act upon it in good faith, that the persons so executing it will not be heard in claiming that the delivery was in violation of an understanding or condition that the instrument was not to take effect until executed

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<sup>1</sup> *Russell v. Freer*, 56 N. Y. 67; *Dair v. United States*, 16 Wall, 1; *State v. Peck*, 53 Me. 284; *State v. Pepper*, 31 Ind. 76; *McCormick v. Bay City*, 23 Mich. 457.

In *Fletcher v. Austin*, 11 Vt. 447, the court says, "If a bond contains the names of other obligors, and is delivered without the signatures of all, the obligee must inquire whether those who have signed, consent to its being delivered without the signatures of others."

<sup>2</sup> *Smith v. Peoria County*, 59 Ill. 412. But see *Fletcher v. Austin*, 11 Vt. 447; *State Bank v. Evans*, 3 Greene (N. J.), 155; *Pawling v. United States*, 4 Cr. 219; *Duncan v. United States*, 7 Pet. 435; *Linn County v. Farris*, 52 Mo. 75; S. C. 14 Am. R. 389; *Ward v. Churn*, 18 Gratt (Va.), 801.

by other persons ; and that the facts present a case for the application of the maxim, that where one of two innocent parties must sustain a loss from the wrongful acts of a third, the loss must be borne by the one who has enabled the wrongdoer to commit the act.<sup>1</sup>

The presence in the body of a bond of the name of a person who does not execute it, raises no presumption that the bond was not to be considered binding on the persons executing it, until such person's signature had been obtained,<sup>2</sup> nor does it raise any implied condition that all named as obligors in the body of the bond shall sign it before it shall be binding on any.<sup>3</sup>

But it has been held, that where a surety before signing a bond, stipulates that it shall be placed in the hands of a third person, there to remain until the principal shall indemnify the surety, and then only be delivered to the obligee, a premature delivery of the bond is void, and constitutes a good defense.<sup>4</sup>

The courts make a clear distinction between bonds and other instruments not negotiable, and negotiable paper, in respect to a defense founded upon a delivery contrary to an express condition. And it is held, that it is no defense for an indorser in an action on a note to show that it was indorsed and delivered by him to the maker upon the express condition that it should also be indorsed by another person, where it does not appear that the plaintiff knew of the condition.<sup>5</sup> It would, however, be a good defense if the note was not negotiable.<sup>6</sup>

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<sup>1</sup> *Russell v. Freer*, 56 N. Y. 67, 71 ; *Nash v. Fosgate*, 24 Gratt. 202 ; S. C. 18 Am. R. 640. See *Deardorff v. Forestmum*, 24 Ind. 481 ; *State v. Peck*, 53 Me. 284 ; *Smith v. Moberly*, 10 B. Mon. 226.

<sup>2</sup> *Johnson v. Weatherwax*, 9 Kans. 75.

<sup>3</sup> *Loew v. Stocker*, 68 Pa. St. 226.

<sup>4</sup> *Whitsell v. McLane*, 64 N. C. 345.

<sup>5</sup> *Bank, &c. v. Phillips*, 17 Mo. 29.

<sup>6</sup> *Ayres v. Milroy*, 53 Mo. 516.

SECTION 23.—*Want, illegality or failure of consideration.*

A bond is not void, at common law, for want of consideration;<sup>1</sup> and, although the surety on the bond receives no consideration directly from the obligor, and the only consideration between the parties is that moving between the obligee and principal debtor, the surety may, nevertheless, be bound. As has been shown, the same consideration which will support a bill or note, will support a contemporaneous guaranty of the same instrument; and it is no defense to a contract of guaranty or suretyship entered into at the same time with the principal obligation, that no consideration was received by the surety or guarantor.<sup>2</sup> The same rule applies where the contract of suretyship or guaranty was entered into after the execution of the principal contract, but in pursuance of a prior agreement.<sup>3</sup> But a past consideration will not support a contract of this nature; and if the only consideration for the guaranty or suretyship is the prior principal contract, the guarantor or surety may plead the want of consideration as a defense.<sup>4</sup>

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<sup>1</sup> Harrell v. Watson, 63 N. C. 454; Parker v. Flora, 63 N. C. 474; Parker v. Parmele, 20 Johns. 130.

<sup>2</sup> Marsh v. Chamberlain, 2 Lans. 287; Farnsworth v. Clark, 44 Barb. 601; Bailey v. Croft, 4 Taunt. 611; Robertson v. Findley, 31 Mo. 384; Henderson v. Rice, 1 Cold. (Tenn.) 223.

<sup>3</sup> Grim v. Semple, 39 Iowa, 570; McNaught v. McClaughry, 42 N. Y. 22.

<sup>4</sup> Yale v. Edgerton, 14 Minn. 194; Tomlinson v. Gell, 6 Ad. & Ell. 564; Parker v. Bradley, 2 Hill, 584; Farnsworth v. Clark, 44 Barb. 601; Weed v. Clark, 4 Sand. 31; Ware v. Adams, 24 Me. 177; Rix v. Adams, 9 Vt. 233; Eldar v. Warfield, 7 Harris & J. 391.

In Jaffray v. Brown (74 N. Y. 393), one Medbury made and delivered to the plaintiffs his promissory note for goods sold. The plaintiffs afterwards claimed that they had been defrauded in the sale, and threatened to reclaim the goods, unless further security was given. The maker thereupon took the note to the defendant Brown, and requested her to indorse it, stating that the plaintiffs wanted an indorser. The defendant claimed that there was no suffi-

A total failure of consideration is always a good defense in an action against a surety on a promissory note. Thus, if a person indorses a note as security for a debt due from the maker to the payee, upon the agreement of the latter to discontinue a suit brought by him for the recovery of the debt, it is a good defense, in an action against the indorser, that the payee did not discontinue the suit, but proceeded to judgment and execution in violation of the agreement.<sup>1</sup>

But it is no defense to a surety that he voluntarily became such, without the assent or knowledge of the principal.<sup>2</sup>

The sufficiency of a consideration for a guaranty or contract of suretyship has been discussed in a previous chapter.

The surety may also defend an action on his contract by showing that the original obligation is void by reason of being founded on an illegal consideration.<sup>3</sup> Thus, if an officer *colore officii* exacts a bond to himself, which he has no authority to require, and which is positively prohibited, the surety may avoid it as well as the principal.<sup>4</sup> So, the surety on a note may defend by showing that the note

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cient consideration to bind the indorser, because the goods for which the note was given had been delivered without any promise of security before the indorsement was demanded. The court held, that, even if it be conceded that a debtor cannot voluntarily give additional security to his creditor for a subsisting indebtedness, the fact that the creditor claimed to have been defrauded in the sale, and threatened to, and was about to, reclaim his goods unless further security was given, but relinquished his remedy in consideration of the indorsement, was an adjustment of the matter, furnishing a valid consideration for the indorsement, if one were needed in addition to the indebtedness; and that, in absence of evidence showing that the claim of fraud was made in bad faith, it was not necessary to show that it was well founded.

<sup>1</sup> Bookstaver v. Jayne, 60 N. Y. 146.

<sup>2</sup> Huges v. Littlefield, 6 Shep. 400.

<sup>3</sup> Levy v. Wise, 15 La. Ann. 38; Daniels v. Barney, 22 Ind. 207.

<sup>4</sup> Thompson v. Buckhannon, 2 J. J. Marsh. 416.

was given by the principal to pay a gambling debt;<sup>1</sup> or to procure a composition by which the payee was to gain a secret preference over other creditors.<sup>2</sup>

SECTION 24.—*Proof of the existence of the relation.*

The question whether it is competent for one of two or more makers of a promissory note or other obligation to prove *by parol* that he signed the note as surety, for the purpose of enabling him to interpose, in a court of law, as a defense, that he has been discharged from liability thereon, by an extension of time given to the principal debtor, with knowledge of the suretyship, or any other like defense, has been the subject of much controversy, and has given rise to conflicting decisions. The ground of the objection to such evidence is, that it tends to vary the terms or legal effect of the written instrument. There never has been any dispute that such evidence was admissible in a court of equity,<sup>3</sup> and in those States in which the same courts are vested with both legal and equitable jurisdiction, there seems to be no reason why the same evidence should not be admissible as a defense in an action at law.

In New York and many of the other States, it is well settled that one of two or more makers of a note may show, by parol, that he signed it as a surety,<sup>4</sup> the courts

<sup>1</sup> Leckie v. Scott, 10 La. Ann. 412.

<sup>2</sup> Wells v. Girling, 1 Brod. & Bing. 447. See Lawrence v. Clark, 36 N. Y. 128; Bliss v. Matteson, 45 N. Y. 22; Townsend v. Newell, 22 How. 164.

<sup>3</sup> Gahn v. Niemcewicz, 3 Paige, 614; Hubbard v. Gurney, 64 N. Y. 457; Smith v. Tunno, 1 McCord Ch. 443.

<sup>4</sup> Hubbard v. Gurney, 64 N. Y. 457; Fowler v. Alexander, 1 Heisk. (Tenn) 425; Piper v. Newcomer, 25 Iowa, 221; Covielle v. Allen, 13 Iowa, 289; Maynard v. Fellows, 43 N. H. 255; Derry Bank v. Baldwin, 41 N. H. 434; Jones v. Fleming, 15 La. Ann. 522; Flynn v. Mudd, 27 Ill. 323; Stewart v. Parker, 55 Ga. 656; Cummings v. Little, 45 Me. 183; Brown v. Haggerty, 26 Ill. 469; Coats v. Swindle, 55 Mo. 31; Riley v. Gregg, 16 Wis. 666; Matheson v. Jones, 30 Ga. 306; Paul v. Berry, 78 Ill. 158.

holding that such evidence does not tend to alter or vary either the terms or legal effect of the written instrument, but merely to show a collateral fact.

In other States, one of several makers of a joint and several promissory note will not be permitted to show, in defense of an action on the note, that, as between him and the other joint makers, he was a surety.<sup>1</sup>

Where the note remains in the hands of the payee, he is presumed to know the relation the other parties to the note sustain to each other, as, for example, that one of the parties signed the note as surety only.<sup>2</sup> But when a person, not a party to a note, has placed his name upon the back, intending, by some form of contract, to bind himself for its payment, the question as to whether he is bound by the presumption of law as to the manner in which he intended to become bound, or whether he may show by parol the real nature of the contract, is not harmoniously settled. In some of the States, the legal presumption controls, and the party thus indorsing the note is not allowed to give evidence of facts rebutting the presumption.<sup>3</sup> In other States, the real nature of the contract may be shown.<sup>4</sup>

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<sup>1</sup> *Shriven v. Lovejoy*, 32 Cal. 574; *Bull v. Allen*, 19 Conn. 101; *Hendrickson v. Hutchinson*, 5 Dutch. (N. J.) 180. See, also, *Farrington v. Galliway*, 10 Ohio, 543.

<sup>2</sup> *Ward v. Stout*, 32 Ill. 399.

<sup>3</sup> *Essex Co. v. Edmands*, 12 Gray (Mass.), 273; *Jack v. Morrison*, 48 Penn. St. 113; *Clapp v. Rice*, 13 Gray (Mass.), 403; *Spies v. Gilmore*, 1 N. Y. 321. See *ante*, pp. 28, 31, 33.

<sup>4</sup> *Sylvester v. Downer*, 20 Vt. 355; *Strong v. Riker*, 16 Vt. 554; *Seymour v. Farrell*, 51 Mo. 95; *Cahn v. Dutton*, 60 Mo. 297. See *ante*, pp. 30, 31. This is believed to be the rule in all the States except New York, Pennsylvania and Massachusetts. Where several persons execute a promissory note, there is no presumption, from the order of their signatures, that any one or more of them, if less than all, are principals and the others sureties. The relation they sustain to each other is to be determined by evidence *aliunde*. *Paul v. Berry*, 78 Ill. 158; *Summerhill v. Tapp*, 52 Ala. 227.



To the general rule, that a maker of a note may show that he signed the same as surety, there is at least one exception. If the makers have expressly stated in the note the relation which they occupy towards each other, as, for example, they "jointly and severally, all as principals promise," &c., none of them can show by parol that they were sureties only.<sup>1</sup>

In some States it has been held, that the fact that a maker of a note signed as surety cannot be shown, unless it be further shown that the creditor agreed to hold the surety as such.<sup>2</sup>

It has also been held, that where a party places the word "security" after his signature to a note, it may be shown by parol that he was in fact the principal.<sup>3</sup>

The general principle allowing one of the makers of a joint or joint and several note to prove by parol that he was a surety only, applies as well when such notes are under seal;<sup>4</sup> or when the obligation is in the form of a bond or mortgage.<sup>5</sup> There is a class of cases, however, which hold that the fact of suretyship cannot, at law, be shown by parol, when the instrument in suit is under seal.<sup>6</sup>

#### SECTION 25.—*Proof of knowledge of the relation.*

In actions against sureties, proof of the fact of suretyship, is merely preliminary to the proof that the creditor has done some act by which the rights of the surety have

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<sup>1</sup> *Exter Bank v. Stowell*, 16 N. H. 61; *Heath v. Derry Bank*, 44 N. H. 174.

<sup>2</sup> *Stroop v. McKenzie*, 38 Texas, 132.

<sup>3</sup> *Row v. Madden*, 1 Kansas, 445.

<sup>4</sup> *Fowler v. Alexander*, 1 Heisk. (Tenn.) 425; *Rogers v. School Trustees*, 40 Ill. 428; *Smith v. Douk*, 3 Tex. 215; *Smith v. Clopton*, 48 Miss. 66.

<sup>5</sup> *Creigh v. Hedrick*, 5 West Va. 140; *Metzner v. Baldwin*, 11 Minn. 150.

<sup>6</sup> See *Levy v. Hampton*, 1 McCord Law, 145; *Willis v. Ives*, 1 Sm. & M. 307; *Pritchard v. Davis*, 1 Spencer, 205.

been infringed, and this act was done with knowledge of the relation between the parties. So far as the rights of the surety are concerned, it is immaterial whether the creditor had this knowledge at the time the contract was entered into, or whether such knowledge was brought home to him afterwards, but before the commission of the act complained of.<sup>1</sup> The fact that one of two debtors is a surety for the other, may or may not be known to the creditor. If it is known to him, he is bound to regard the surety's equities in all his subsequent dealings with the principal respecting the debt. If the fact is not known to him he is unaffected by it.<sup>2</sup> There are certain legal presumptions that take the place of direct proof of such knowledge. Thus, where the payee of a promissory note brings an action thereon against a principal and surety, he is presumed to know the relation the parties occupied towards each other.<sup>3</sup> So, where a married woman gives a mortgage on her lands to a creditor of her husband to secure his debt, and her title is upon record, the fact that the creditor had no actual knowledge of the wife's ownership of the premises, and the resulting relationship of principal and surety between the husband and wife, is not material, as the creditor is chargeable with knowledge of the ownership from the fact of its being a matter of record, and also with knowledge of the legal consequences resulting therefrom.<sup>4</sup>

Where a note has been transferred before maturity to an assignee, there is no presumption that the holder has

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<sup>1</sup> *Colgrove v. Tallman*, 2 Lans. 97; S. C. 67 N. Y. 95; *Bank of Missouri v. Matson*, 26 Mo. 243; *Pooley v. Harradim*, 7 Ell. & Bl. 431; *Hubbard v. Gurney*, 64 N. Y. 457; *Lanman v. Nichols*, 15 Iowa, 161; *Wheat v. Kendall*, 6 N. H. 504.

<sup>2</sup> *Smith v. Shelden*, 35 Mich. 42; S. C. 24 Am. R. 529.

<sup>3</sup> *Ward v. Stout*, 32 Ill. 399. See *Cummings v. Little*, 45 Me. 182; *Champion v. Robertson*, 4 Bush (Ky.), 17.

<sup>4</sup> *Bank of Albion v. Burns*, 46 N. Y. 170.

any knowledge that any of the parties appearing to be makers were, in fact, mere sureties; and if a surety seeks to defend an action on the note, on the ground that he has been discharged by an agreement between the holder and principal debtor, extending the time of payment, he must both allege and prove that, at the time of granting such extension, the holder of the note had knowledge of the relation.<sup>1</sup> So, if the defense relied upon is an alteration of the original contract without the knowledge or consent of the surety, the surety must not only prove the existence of the relation, but also that the creditor knew the fact at the time of the act complained of.<sup>2</sup>

SECTION 26.—*Evidence impeaching the instrument.*

Where the instrument sued upon has been delivered to the payee or obligee, parol evidence of conditions qualifying the delivery, being contrary to the terms of the instrument is not admissible.<sup>3</sup> And where the instrument sued upon is a bond, the defendants cannot, as a general rule, vary or contradict the recitals therein by parol evidence.<sup>4</sup>

The execution of a bond by another surety beneath the name of other obligors, without the knowledge or consent of the previous sureties, as a condition of the postponement of a trial, estops the last surety from denying the recitals in the same which imported that it was executed upon the institution of an action in replevin, and taken at the proper time.<sup>5</sup> So, in an action against the sureties upon an undertaking purporting to have been

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<sup>1</sup> Neel v. Harding, 2 Met. (Ky.) 247. See Agnew v. Merritt, 10 Minn. 308.

<sup>2</sup> Burke v. Cruger, 8 Texas, 66.

<sup>3</sup> Worrall v. Munn, 5 N. Y. 229; Cocks v. Barker, 49 N. Y. 107; Gilbert v. North American Fire Ins. Co. 23 Wend. 43.

<sup>4</sup> Cocks v. Barker, 49 N. Y. 107.

<sup>5</sup> Decker v. Judson, 16 N. Y. 439.

given to procure the discharge of an attachment, it is not competent to show that no attachment was issued, or that the sureties were induced to execute the undertaking by representations which were false; and if no attachment actually issued in the action, the recital in the undertaking will be conclusive evidence of a waiver of the issuing of the writ.<sup>1</sup> And it is settled in New York, at least, that parties to an undertaking in replevin may waive the formalities of the statutory proceeding, and thus become estopped from asserting or proving its invalidity by the recitals in the same.<sup>2</sup>

So, if a person is illegally appointed to an office, but executes a bond for the faithful performance of his duties, in the form and with the conditions required by law for official bonds, and takes the oath of office and assumes the duties of his office, both he and his sureties will be estopped from setting up as a defense and proving the illegality of his appointment, and that the bond was not required by law.<sup>3</sup> So, if a bond be given by an officer before the forfeiture of the office is duly declared, it will be held as a valid security, and the sureties will be estopped from showing the non-performance by their principal of the statutory requirements.<sup>4</sup> And, generally, where an official bond recites that the principal has been elected or appointed to a specified office; his sureties will, in an action on the bond, be estopped by the recital from showing that he was not legally elected or appointed to the office, or otherwise denying his official character.<sup>5</sup>

Where an instrument, complete upon its face, has been

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<sup>1</sup> *Coleman v. Bean*, 1 Abb. Ct. App. Decis. 394.

<sup>2</sup> *Harrison v. Wilkin*, 69 N. Y. 412.

<sup>3</sup> *Taylor v. State*, 51 Miss. 79.

<sup>4</sup> *State v. Cooper*, 53 Miss. 615.

<sup>5</sup> *Kelly v. State*, 25 Ohio St. 567; *Burnett v. Henderson*, 21 Texas, 588; *Inhabitants of Wendell v. Fleming*, 8 Gray, 613.

delivered to the obligee by the principal obligor, and acted upon without notice of any restrictions upon the right of the obligor to deliver the same, the sureties in the obligation, who delivered the instrument conditionally to such obligor, will be estopped from showing that the instrument was delivered in violation of such conditions.<sup>1</sup>

SECTION 27.—*Evidence of matters subsequent to the execution of the contract.*

Where a surety seeks to defend an action against him, on the ground that there has been an unauthorized indulgence given or composition made with the principal debtor, he must show that it has been effected by express agreement founded upon a valid consideration and legally binding on the creditor.<sup>2</sup> How this shall be shown depends upon circumstances. Payment of interest in advance by the principal debtor after the principal obligation has matured, will furnish *prima facie* evidence of a contract for delay;<sup>3</sup> and the agreement may be inferred or implied from other acts, declarations, facts and circumstances.<sup>4</sup> But the payment of extra interest by the principal, followed by a mere forbearance to sue, is not, of itself, sufficient to prove that such payment was the consideration for the forbearance. The burden is on the surety to establish that fact, in order to entitle him to his discharge.<sup>5</sup>

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<sup>1</sup> *Dair v. United States*, 16 Wall. 1; *Russell v. Freer*, 56 N. Y. 67; *Nash v. Fugate*, 24 Gratt. (Va.) 202; and see *ante*, p. 100.

<sup>2</sup> *Oberndorf v. Union Bank of Baltimore*, 31 Md. 126; S. C. 1 Am. R. 31. See *ante*, p. 240.

<sup>3</sup> *Savings Bank v. Ela*, 11 N. H. 336; *Woodburn v. Carter*, 50 Ind. 376; *Jarvis v. Hyatt*, 43 Ind. 163; *New Hampshire Savings Bank v. Colcord*, 15 N. H. 119; *Peoples' Bank v. Pearsons*, 30 Vt. 711; *Scott v. Safford*, 37 Ga. 384. See *ante*, p. 248.

<sup>4</sup> *Brooks v. Wright*, 13 Allen (Mass.), 72.

<sup>5</sup> *Eaton v. Waite*, 66 Me. 221.

The defense of usury, of the statute of limitations of payment and performance, or of any of the other defenses available to a surety, are to be established in the same manner and with the same class of evidence as would be required in other actions.

## CHAPTER XX.

### ACTIONS OR SUITS TO ENFORCE CONTRIBUTION, AND DEFENSES THERETO.

#### SECTION 1.—Parties plaintiff.

- 2.—Parties defendant.
- 3.—Complaint or declaration.
- 4.—Evidence for the plaintiff.
- 5.—Disproving plaintiff's case.
- 6.—Request or promise to indemnify defendant against loss.
- 7.—(Set off,) recoupment or counter-claim.
- 8.—Statute of limitations.
- 9.—Discharge or release of surety or co-sureties.
- 10.—Release of principal.
- 11.—Release or other disposition of securities.
- 12.—Release of claim for contribution.

#### SECTION 1.—*Parties plaintiff.*

As has been stated, the obligation of one of two co-sureties is to pay the whole debt. His right is, if he pays the whole debt, to recover one-half from his co-surety, or the whole from the principal. If he pays less than the whole debt, he cannot recover from his co-surety, though he may from his principal, more than the amount which he has paid in excess of the moiety, which, as between him and his co-surety, it was his duty to pay.<sup>1</sup>

On the death of one of several co-sureties, his executor may be joined with a part of the sureties in an action against another for contribution ;<sup>2</sup> and where one of two sureties dies, and his executor pays the full debt without

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<sup>1</sup> *Morgan v. Smith*, 70 N. Y. 537 ; *Lowell v. Edwards*, 2 Bos. & Pull. 268 ; *Browne v. Lee*, 6 Barn. & Cress. 689 ; *Deering v. Earl of Winchelsea*, 2 Bos. & Pull. 542.

<sup>2</sup> *Dussol v. Bruzuiere*, 50 Cal. 456.

having the claim allowed in the probate court, he may as executor, recover contribution from the other surety.<sup>1</sup>

Sureties on a note cannot maintain a joint action for contribution against a co-surety unless they have paid the note jointly.<sup>2</sup> But when a judgment has been recovered against sureties, and they pay it jointly, they may join in a bill to compel the heirs of a deceased co-surety to make contribution, and a decree may be made in the suit against the defendants severally, for the amount for which each is liable.<sup>3</sup> And where several persons are each responsible as co-sureties for an entire sum, and join in making payment of that sum by a contribution agreed upon among themselves for that purpose, they may join in one action against another co-surety to compel contribution from him.<sup>4</sup> So, where each of several solvent sureties discharge a debt, by each paying an equal amount, they may join in equity to compel contribution from another solvent surety for the same debt, although they could not join in an action at law.<sup>5</sup>

Partners, who signed in the partnership name, are to be regarded as but one surety on a question of contribution.<sup>6</sup>

Where a person applies to another to become his surety on a bill, for the purpose of having it discounted

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<sup>1</sup> *Dussol v. Bruzuiere*, 50 Cal. 456.

<sup>2</sup> *Prescott v. Newell*, 39 Vt. 82; *Lombard v. Cobb*, 14 Me. 222.

<sup>3</sup> *Fletcher v. Jackson*, 23 Vt. 581. Where a sheriff wrongfully levied upon a county order, and gave it to the execution creditor, who accepted it at par, and a judgment was subsequently recovered against the sheriff and his sureties for the amount of the order, and the sureties paid the whole amount, it was held, that they could recover the amount so paid in a joint action against the execution creditor. *Skiff v. Cross*, 21 Iowa. 459.

<sup>4</sup> *Clapp v. Rice*, 15 Gray (Mass.), 557.

<sup>5</sup> *Young v. Lyons*, 8 Gill (Md.), 162.

<sup>6</sup> *Chaffee v. Jones*, 19 Pick. 260.



at a bank, and the person applied to refuses to become surety, but secures the signature of another person instead, by promising to pay the bill, if the principal does not, the person so promising may, on being obliged to take up the bill, recover contribution of the prior sureties, he being the co-surety in fact, signing in the name of another. But the sum paid in taking up the bill cannot be recovered in the name of the person actually signing the bill as surety.<sup>1</sup>

### SECTION 2.—*Parties defendant.*

The general principle, that the right of mutual contribution exists only among those who are sureties for the same thing, and bound for the same debt or duty, is one of the tests by which to determine who should be made defendant in an action for contribution. As has been stated, the question of co-suretyship is to be determined by the substance rather than the form of the contracts of the parties, and by their engagements rather than by the instruments by which they are evidenced; and the liability of a surety to contribution, does not depend on whether he is bound by the same instrument as the party seeking contribution, nor whether the parties had knowledge of the other's engagement, but rather, whether the contracts of the sureties are the same in their legal operation and character.<sup>2</sup> A person may not be in a condition to enforce contribution from other sureties of the same principal, and yet be himself liable to contribution at the suit of the others.<sup>3</sup>

A guarantor of the ability of the maker of a note is not in privity with the sureties in the same instrument,

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<sup>1</sup> Stout v. Vause, 1 Rob. (Va.) 169.

<sup>2</sup> Monson v. Drakeley, 40 Conn. 552.

<sup>3</sup> Id.

and is not a proper party defendant in an action by a surety against his co-sureties for contribution.<sup>1</sup> This is, also, true of a supplemental surety for all the prior parties, including the principal.<sup>2</sup>

Where administrators execute a bond with sureties, conditioned for the faithful discharge of their duties as administrators, and afterwards give an additional bond with sureties on a sale of the real estate of their intestate, the sureties on the latter bond are not co-sureties with the sureties on the original bond, and are not proper parties defendant in an action brought by a surety on the original bond for contribution.<sup>3</sup>

Where a surety files a bill in equity against a co-surety for contribution, the principal and other sureties who are insolvent are not *necessary* parties.<sup>4</sup> But it is also held, that the principal debtor is a *proper* party to the bill, and cannot object that the plaintiff, as to him, has an adequate remedy at law;<sup>5</sup> and in other cases it has been held, that the principal debtor or his representative is a *necessary* party.<sup>6</sup>

Where one or more of the co-sureties in a note or other obligation are out of the jurisdiction of the court, and the others are within it, a surety who has been compelled to pay the debt of their common principal may proceed in equity against those only who are within the jurisdiction, by stating the fact in his bill, and the defendants will be compelled to make contribution without regard to the share of the absent surety or sureties.<sup>7</sup>

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<sup>1</sup> Monson v. Drakeley, 40 Conn. 552.

<sup>2</sup> Monson v. Drakeley. 40 Conn. 552.

<sup>3</sup> Salyers v. Ross, 15 Ind. 130.

<sup>4</sup> Johnson v. Vaughn, 65 Ill. 425; Byers v. McClenahan, 6 Gill & J. 250.

<sup>5</sup> Trescat v. Smyth, 1 McCord Ch. 300.

<sup>6</sup> Rainey v. Yarborough, 2 Ired. Ch. 249.

<sup>7</sup> Jones v. Blanton, 6 Ired. Eq. 115; McKenna v. George, 2 Rich. Eq. 15.

In an action at law for contribution, it is improper to join all the co-sureties as defendants. The action must be brought against each separately to enforce his individual liability.<sup>1</sup> But, in equity, an action may be brought against all the sureties, and contribution adjudged among the solvent parties.<sup>2</sup>

When judgments have been recovered against a stockholder of a manufacturing corporation, by the employees of the corporation, and the defendant has been obliged to satisfy these judgments, he may maintain a bill in equity against all the other stockholders to recover from them their share of the amount so paid; but he cannot maintain an action at law against the stockholders separately, to recover from them the proportion due from each.<sup>3</sup> It seems that one surety cannot maintain an action against one of several co-sureties to recover the proportionate amount due from him, except in those cases in which the liability grew out of one single transaction of mere suretyship.<sup>4</sup>

Where a judgment has been obtained against the sureties in an injunction bond, and one of them has paid the debt, he need not, in an action against his co-sureties for contribution, join as defendants the sureties of the defendants in the judgments.<sup>5</sup>

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The removal of a surety from the State has the same effect as insolvency. *Boardman v. Paige*, 11 N. H. 431.

<sup>1</sup> *Powell v. Matthis*, 4 Ired. 83. See *Stothoff v. Dunham's Exrs*, 4 Harrison (N. J.), 181; *Morrison v. Poyntz*, 7 Dana, 307; *Colwell v. Edwards*, 2 Bos. & Pull. 268; *Brown v. Lee*, 6 B. & C. 697; *Batard v. Hawes*, 2 E. & B. 287.

<sup>2</sup> *Easterly v. Barber*, 66 N. Y. 433. See *Peter v. Rich*, 1 Ch. R. 19; *Holt v. Harrison*, 1 Ch. Cas. 246.

<sup>3</sup> *Clark v. Myers*, 11 Hun, 608.

<sup>4</sup> See *Clark v. Myers*, 11 Hun, 608.

<sup>5</sup> *Hilton v. Crist*, 5 Dana, 384.

SECTION 3.—*Complaint or declaration.*

The pleadings on the part of the plaintiff in a suit or action for contribution, will, of course, be governed by the form of the action and the rules of practice of the State where the action is brought.

Where the surety seeks relief in equity against co-sureties, some of whom are insolvent or are without the jurisdiction of the court, the bill should allege these facts. Whether it is necessary to allege the insolvency of the principal debtor or not, in order to maintain this action, is not clearly determined. In some of the courts it has been held, that the insolvency of the principal must be alleged;<sup>1</sup> and, in others, it has been held that the allegation is unnecessary.<sup>2</sup>

The surety must, of course, allege the facts out of which his right to contribution springs; and these facts will depend on the circumstances of each case, and whether it is sought to obtain contribution from the co-surety himself, or from his heirs or administrators after his death.<sup>3</sup>

It is not necessary to allege or prove that the plaintiff gave notice of payment to his co-surety, or made a demand on him for contribution, before bringing the action.<sup>4</sup> Nor is it necessary for the plaintiff to allege or prove that he paid the debt under the compulsion of a suit.<sup>5</sup>

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<sup>1</sup> *Bolling v. Doneghy*, 1 Duval (Ky.), 220. See *Allen v. Wood*, 3 Ired. Ch. 386; *McCormack v. Obannon*, 3 Mumf. 484; *Daniel v. Ballard*, 2 Dana, 296.

<sup>2</sup> *Rankin v. Collin*, 50 Ind. 158; *Odlin v. Greenleaf*, 3 N. H. 270; *Sloo v. Pool*, 15 Ill. 47.

<sup>3</sup> For the requisites of a bill in equity against the administrator and heirs of a deceased co-surety, see *Conover v. Hill*, 76 Ill. 342; *Harris v. Douglass*, 64 Ill. 466; *Van Demark v. Van Demark*, 13 How. (N. Y.) 372.

<sup>4</sup> *Chaffee v. Jones*, 19 Pick. 260. But see *Carpenter v. Kelly*, 9 Ham. 106.

<sup>5</sup> See *Linn v. McClelland*, 4 Dev. & Batt. 458; *Camp v. Bostwick*, 20 Ohio St. 337; s. c. 5 Am. R. 669.

SECTION 4.—*Evidence for the plaintiff.*

To make a *prima facie* case for contribution, it will be sufficient for the plaintiff to show that he became liable as a surety for the payment of the entire debt of his principal; that the defendants were co-sureties for the same debt; and that, as such surety, he has paid more than his proportion of the debt.<sup>1</sup> How this shall be shown is another question. If it appears, on the face of a promissory note, that one of the makers is principal and the others are sureties, the character in which the parties signed will be presumed to be correctly exhibited by it. This presumption may, however, be rebutted by the other party, by showing that he signed as supplemental surety for the plaintiff, or otherwise.<sup>2</sup> But until this is shown, the plaintiff will sufficiently establish the relation of co-suretyship by the bare production of the note.

If, however, the defendant signed the note after its execution by the plaintiff, and added to his signature the words, "surety to the above," the plaintiff must, in some manner, make it satisfactorily appear that the defendant intended to place himself in the relation of co surety with the plaintiff.<sup>3</sup>

In some States it may be necessary for the plaintiff to show that, since he was compelled to pay the debt, he used due diligence to obtain reimbursement from the principal without effect, or that the principal is insolvent.<sup>4</sup>

The plaintiff must also prove an actual payment in

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<sup>1</sup> See *Van Demark v. Van Demark*, 13 How. (N. Y.) 372.

<sup>2</sup> *Harris v. Brooks*, 21 Pick. 195; *Crosby v. Wyatt*, 10 Shep. 156; *Oldham v. Broom*, 28 Ohio St 41; *Monson v. Drakeley*, 40 Conn. 552. See *Wells v. Miller*, 66 N. Y. 255; *Robertson v. Deatherage*, 82 Ill. 511.

<sup>3</sup> *Thompson v. Sanders*, 4 Dev. & Batt. 404.

<sup>4</sup> *M'Cormack v. Obannon*, 3 Mumf. 484; *Stone v. Buckner*, 12 S. & M 73; *Daniel v. Ballafld*, 2 Dana, 296; *Allen v. Wood*, 3 Ired. Ch. 386.

money or money's worth;<sup>1</sup> and, it has been held, that it is not sufficient to show that he has given his own note for the debt, although it may have been accepted by the creditor as payment.<sup>2</sup> But this rule is not universally recognized.<sup>3</sup> The plaintiff must, however, show that he has, in some manner, satisfied the creditor's claim, or paid more than his proportion of the common liability.<sup>4</sup>

Parol evidence of payment is admissible and sufficient, notwithstanding it may appear that judgment has been recovered upon the demand against the principal and sureties, and that the payment was made upon an execution which is not produced.<sup>5</sup> The plaintiff is not required, in such case, to prove that he caused the amount of his payment to be indorsed upon the execution.<sup>6</sup>

In an action for contribution, where the contract fails to disclose the fact that the plaintiff was a surety merely, he may prove by parol that he signed the contract as surety, and that the defendant knew the fact when he executed it.<sup>7</sup>

If the plaintiff seeks to recover from one of several co-sureties one-half of the entire amount of the debt paid,

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<sup>1</sup> *Brisendine v. Martin*, 1 Ired. 286; *Nowland v. Martin*, 1 Ired. 307.

<sup>2</sup> *Id.*

<sup>3</sup> See *ante*, p. 327; *White v. Carlton*, 52 Ind. 371; *Pinkston v. Taliaferro*, 9 Ala. 547; *Elwood v. Diefendorf*, 5 Barb. 398.

<sup>4</sup> *Camp v. Bostwick*, 20 Ohio St. 337; S. C. 5 Am. R. 669. But see *McKenna v. George*, 2 Rich. Eq. 15.

<sup>5</sup> *Hammond v. Rice*, 18 Vt. 353.

<sup>6</sup> *Hammond v. Rice*, 18 Vt. 353.

<sup>7</sup> *Fernald v. Dawley*, 26 Me. 470. In a suit by a prior indorser against a subsequent indorser of a promissory note, proof of an oral agreement made between the parties, at the time of the indorsement, that they should be co-sureties, is admissible. *Smith v. Morrill*, 54 Me. 48. A person who appears to be an indorser may be shown to have, in fact, been a mere surety, and therefore liable to contribution. *Nurre v. Chittenden*, 56 Ind. 462. And it is competent for a maker of a note, in a suit against another maker for contribution, to prove by parol the true relation the parties sustained to each other, as, for example, whether principal and surety or co-sureties. *Robertson v. Deatherage*, 82 Ill. 511.

he must prove the insolvency of the other sureties, or their absence from the State.<sup>1</sup>

If, in the action for contribution, it is shown in defense that the principal has made an assignment for the benefit of his creditors, and sufficient property passed under the assignment to pay the debt in question, this will be *prima facie* evidence of the satisfaction of the debt of the principal, and to recover in the action the plaintiff must rebut the presumption.<sup>2</sup>

It is never necessary for the plaintiff to show an express contract for contribution, or knowledge on the part of the defendant of the plaintiff's engagement, from which a contract for contribution could be implied, as the right of contribution springs from principles of natural equity, and not from contract.<sup>3</sup>

#### SECTION 5.—*Disproving plaintiff's case.*

The defendant, in an action to enforce contribution, may of course disprove any fact necessary to the maintenance of the plaintiff's case, or may set up such affirmative defenses as he may have. He may show that he is not liable to contribution by proving, by parol evidence or otherwise, that he does not occupy the position of a co-surety with the plaintiff.<sup>4</sup>

Thus, in an action between accommodation makers of a note for contribution, the presumption that they are co-sureties may be rebutted by parol evidence of the actual contract between them, if the contract is not in

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<sup>1</sup> *Stone v. Buckner*, 12 S. & M. 73.

<sup>2</sup> *Cockayne v. Sumner*, 22 Pick. 117.

<sup>3</sup> See *Barry v. Ransom*, 12 N. Y. 462; *Craythorne v. Swinburne*, 14 Ves. 160; *Norton v. Coons*, 6 N. Y. 33. See, also, *ante*, p. 319.

<sup>4</sup> *Harris v. Brooks*, 21 Pick. 195; *Crosby v. Wyatt*, 10 Shep. 156; *Oldham v. Broom*, 28 Ohio St. 41; *Monson v. Drakeley*, 40 Conn. 552; *Dawson v. Pettway*, 4 Dev. & Batt. 396.

writing, and the defendant may show that he signed as surety for the original makers, and not as co-surety with the prior sureties.<sup>1</sup>

The surety may also show, as a partial defense, that the plaintiff bought up the demands of the creditor against the principal at a discount, and is, therefore, entitled to contribution on the sum actually paid;<sup>2</sup> or that the payment made by the plaintiff was in depreciated currency, and that his right to contribution is limited to the value of the currency.<sup>3</sup>

So the defendant may show by parol the relation of the parties, and any extrinsic fact affecting the equities.<sup>4</sup>

The defendant may also show an agreement between the co-sureties of an instrument, by which their unity of interest and obligation was so far severed as to terminate the right of contribution.<sup>5</sup>

The defendant may also show that the payments made by the party seeking contribution were mere voluntary payments for which he cannot claim contribution.<sup>6</sup> This

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<sup>1</sup> *Oldham v. Broom*, 28 Ohio St. 41. And see cases above cited. In *Norton v. Coons*, 6 N. Y. 33, it was held, by Gray, J., that where several sureties sign a note of the principal, at his request, at different times, without communication with each other, they are bound to contribute equally to the payment of the note, in case of the failure of the principal; that parol proof is not admissible to qualify the liability of such sureties to each other; that, from the execution of the note by them, there arose an implied obligation between them to share the burden equally; and that parol evidence is no more admissible to contradict what is implied from a written contract, than to contradict its express conditions. But the question, in that case, was upon the sufficiency of the parol evidence to make out a contract which should exempt the defendant from contribution, and not upon the legal competency of parol evidence; and, although one of the judges was of the opinion that parol evidence was inadmissible, the other members of the court, who concurred in the judgment, were careful to put the decision upon other grounds. See *Barry v. Ransom*, 12 N. Y. 467.

<sup>2</sup> *Sinclair v. Redington*, 56 N. H. 146.

<sup>3</sup> See *ante*, p. 336.

<sup>4</sup> *Wells v. Miller*, 66 N. Y. 255.

<sup>5</sup> *Paul v. Berry*, 78 Ill. 158.

<sup>6</sup> See *ante*, p. 321; *Russell v. Taylor*, 1 Ohio St. N. S. 327.



will be shown when it is made to appear that the payment was made with full knowledge of the facts, but under a mistaken belief of liability;<sup>1</sup> but not when it appears that the payments were made in good faith, and in ignorance of the facts, unless it can be further shown that he was guilty of negligence in such want of knowledge.<sup>2</sup> The mere fact that payment was made before any judgment was recovered against the surety,<sup>3</sup> or even before any demand made upon him for payment,<sup>4</sup> will not render the payment voluntary.

SECTION 6.—*Request or promise to indemnify defendant against loss.*

The defendant in an action for contribution may show, by parol, an agreement made between the parties prior to or contemporaneously with the execution of the written obligation by them as sureties, by which the plaintiff promised to indemnify the defendant against loss accruing by reason of becoming surety.<sup>5</sup>

So, for the purpose of showing how he was induced to sign the obligation, the defendant may state conversations held with the principal at that time.<sup>6</sup>

But the defendant cannot defend an action for contribution by simply showing the fact that he signed the obligation at the request of the plaintiff. If the plaintiff, however, received any personal benefit from the execution of the obligation, as, for example, if the money raised on the obligation goes into his hands, or if he has already

<sup>1</sup> Bancroft v. Abbott, 3 Allen, 524; Warner v. Morrison, 3 Allen, 566.

<sup>2</sup> Hitchborn v. Fletcher, 66 Me. 209.

<sup>3</sup> Hitchborn v. Fletcher, 66 Me. 209.

<sup>4</sup> Pitt v. Purrsord, 8 M. & W. 538.

<sup>5</sup> Barry v. Ransom, 12 N. Y. 462; Wells v. Miller, 66 N. Y. 255, 258; Horn v. Bray, 51 Ind. 555; S. C. 19 Am. R. 742; Blake v. Cole, 22 Pick. 97; Appgar v. Hiler, 4 Zab. (N. J.) 812.

<sup>6</sup> Hendrick v. Whittemore, 105 Mass. 23.

incurred a liability upon an instrument completed by delivery, the court may, with some propriety, treat the plaintiff as a principal and the defendant as a surety only, and not liable to contribute for the benefit of the plaintiff. So, if the defendant signs the obligation upon an express contract for indemnity, the consideration supports the promise, and discharges the surety from his liability to contribution. But, in the absence of such circumstances, parties standing in equal relation to the principal, and signing as sureties for that principal, the one at the request of the other, are not discharged from the legal obligation they have assumed, on the face of the instrument, to each contribute his proportion on default of the chief obligor, by the mere fact that the one entered into the contract at the request of the other.<sup>1</sup> But this doctrine is not universally recognized; and, in some States, one who has become surety at the request of a co-surety, cannot be held liable for contribution.<sup>2</sup>

It is held, in New Hampshire, that where two persons sign the same obligation as sureties for a third—one of them at the request of the principal, and the other at the request of the first surety—they are not co-sureties between themselves; but the first surety stands in the relation of principal to the second, and, while responsible to him for whatever he may be compelled to pay, has, in no event, any claim against the second surety for contribution.<sup>3</sup>

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<sup>1</sup> *Bagott v. Mullen*, 32 Ind. 332; *McKee v. Campbell*, 27 Mich. 497.

<sup>2</sup> *Byers v. McClanahan*, 6 Gill & J. 250; *Turner v. Davies*, 2 Esp. 478; *Daniel v. Ballard*, 2 Dana, 296.

<sup>3</sup> *Cutter v. Emery*, 37 N. H. 567.

SECTION 7.—*Set-off, recoupment or counter-claim.*

In an action by a surety against his co-surety, for contribution, the defendant may set off a debt due him from the plaintiff;<sup>1</sup> and it has been held, that the defendant in such action may successfully defend by showing that the plaintiff was indebted to the principal debtor in a greater sum than he has paid as surety.<sup>2</sup>

But, in New York, it is held that a defendant, in an action for contribution, cannot set up by way of counter-claim, recoupment or set-off, a cause of action existing in favor of the principal against the plaintiff; and that the remedy of the defendant, where the principal is insolvent, is to commence an action in equity against the principal and the party seeking contribution, to have their accounts adjusted, and the amount due the principal applied so as to save the surety from loss.<sup>3</sup>

SECTION 8.—*Statute of limitations.*

The statute of limitations begins to run, as against a claim for contribution, from the time of the payment by the surety of the claim against his principal;<sup>4</sup> and it necessarily follows, that, on the expiration of the time limited by the statute for the commencement of actions of this nature, the action will be barred.<sup>5</sup>

But the surety cannot successfully defend an action for contribution by showing that, at the time the plaintiff paid the principal's debt, the principal was released from

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<sup>1</sup> Long v. Barnett, 3 Ired. Ch. 631.

<sup>2</sup> Bezzell v. White, 13 Ala. 422.

<sup>3</sup> O'Brien v. Karing, 57 N. Y. 649. See Lowndes v. Pinckney, 1 Rich. Ch. 155.

<sup>4</sup> Sherrod v. Woodard, 4 Dev. 360.

<sup>5</sup> Robinson v. Jennings, 7 Bush (Ky.), 630; Neilson v. Fry, 16 Ohio St.

direct liability to the creditor by the operation of the statute of limitations.<sup>1</sup>

SECTION 9.—*Discharge or release of surety or co-sureties.*

The discharge of a surety from his principal's obligation, without discharging his co-sureties, will not relieve him of his liability to them from contribution; and proof of such discharge will be no defense to the action.<sup>2</sup>

But where one surety, in a custom-house bond, is released by the Secretary of the Treasury, pursuant to the act of Congress, with the consent of another surety, the latter cannot, after paying money on account of the bond, maintain an action for contribution against the former.<sup>3</sup>

In those States in which the liability of a surety may be terminated, under the statutes providing for a discharge of a surety after notice given to the creditor to sue, a defendant, in an action for contribution, may defeat the action by showing that he has been discharged from liability by reason of giving notice in compliance with the statute.<sup>4</sup>

In New York, and some of the other States, it is held that the discharge of a surety in bankruptcy is a good defense to an action for contribution brought by a co-surety who has paid the debt for which they are both bound.<sup>5</sup> But in other States the contrary has been held.<sup>6</sup>

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<sup>1</sup> *Camp v. Bostwick*, 20 Ohio St. 337.

<sup>2</sup> *Clapp v. Rice*, 15 Gray (Mass.), 557; *Boardman v. Paige*, 11 N. H. 431. To the contrary, see *Tobias v. Rogers*, 13 N. Y. 59.

<sup>3</sup> *Bouchaud v. Dias*, 3 Denio, 238.

<sup>4</sup> *Letcher v. Yantis*, 3 Dana, 160.

<sup>5</sup> *Tobias v. Rogers*, 13 N. Y. 59; *Hays v. Ford*, 55 Ind. 52; *Miller v. Gillespie*, 59 Mo. 220.

<sup>6</sup> See *Goss v. Gibson*, 8 Humph. 197; *Eberhardt v. Wood*, 2 Tenn. Ch. 488; *Swain v. Barber*, 29 Vt. 292; *Keer v. Clark*, 11 Humph. 77.

SECTION 10.—*Release of principal.*

The surety may show, in defense of an action for contribution, that the co-surety has released the principal from liability to indemnify him, the effect of this release being to terminate the liability of the other co-sureties to contribution.<sup>1</sup>

SECTION 11.—*Release or other disposition of securities.*

A defendant, in an action for contribution, may also show, as a defense, that the principal debtor executed a mortgage to indemnify the plaintiff and defendant from any loss they might sustain by reason of becoming his sureties; and that the plaintiff has released all or a part of the mortgaged property. This will establish a perfect defense to the action to the value or extent of the property so released.<sup>2</sup>

If the indemnity given to the surety purports, on its face, to be an absolute bill of sale of certain chattels, and for a full consideration, a co-surety may, nevertheless, show by parol, in an action against him for contribution, that the bill of sale was given him as an indemnity merely.<sup>3</sup>

In estimating the value of the security released, it will be presumed that it was of the full value expressed upon its face, and the burden of disproving this will be upon the party releasing it.<sup>4</sup>

The mere fact that the plaintiff took counter security from his principal, for his own indemnity, will not bar his

<sup>1</sup> *Draughan v. Bunting*, 9 Ired. 10; *Fletcher v. Jackson*, 23 Vt. 581.

<sup>2</sup> *Roberts v. Sayer*, 6 Monr. 188; *Ramsey v. Lewis*, 30 Barb. 403; *Paulin v. Kaighn*, 5 Dutch. (N. J.) 480; *Taylor v. Morrison*, 26 Ala. 728; *Goodloe v. Clay*, 6 B. Monr. 236.

<sup>3</sup> See *Gregory v. Murrell*, 2 Ired. Ch. 233.

<sup>4</sup> *Paulin v. Kaighn*, 5 Dutch. (N. J.) 480.

right of action for contribution against his co-surety. But the co-surety, on making contribution, will be entitled to be subrogated to the benefit of the counter security; or if, before the action for contribution is brought, the plaintiff has converted the counter security into money, this will operate as a payment of the debt of the principal *pro tanto*, and the defendant may show such payment in defense.<sup>1</sup>

If the surety, in good faith, exchange the securities received from his principal for others, without the knowledge of his co-sureties, this will not discharge them from contribution.<sup>2</sup>

#### SECTION 12.—*Release of claim for contribution.*

The defendant, in an action for contribution, may show that the plaintiff, before the commencement of the action, entered into a valid agreement with the defendant for a good consideration, to release him from all claims for contribution.

It is a sufficient consideration for such release, that the defendant, at the request of the plaintiff, procured the insolvent principal to pay a stipulated sum.<sup>3</sup>

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<sup>1</sup> Paulin v. Kaighn, 5 Dutch. (N. J.) 480. See White v. Banks, 21 Ala. 705.

<sup>2</sup> Carpenter v. Kelly, 9 Ham. 106.

<sup>3</sup> Warren v. Whitesides, 34 Miss. 171.

## CHAPTER XXI.

### ACTIONS BY SURETIES AND GUARANTORS AGAINST THEIR PRINCIPAL, AND DEFENSES THERETO.

- SECTION 1.—Parties plaintiff.  
2.—Parties defendant.  
3.—Voluntary payment.  
4.—Default of surety.  
5.—Disproving payment.  
6.—Disputing validity of the principal obligation.  
7.—Indemnity given surety.  
8.—Amount of recovery.

#### SECTION 1.—*Parties Plaintiff.*

As has already been stated, a surety may maintain an action against his principal, to recover moneys paid to the creditor in discharge of the liability of the parties to the principal obligation, as soon as such payment has been made ; or, if there are several sureties in the same obligation, and one of them has discharged the debt and obtained contribution from his co-sureties, each of them may maintain an action against the principal to recover the moneys paid on making contribution ; or, on the debt becoming due, the surety may, before payment, maintain a suit in equity against the creditor and principal debtor to compel the creditor to obtain payment from the principal ; or, on the payment of a judgment recovered against the principal and surety, the surety becoming subrogated to the rights of the creditor, may maintain a creditor's bill to set aside a fraudulent conveyance made by the principal debtor in fraud of the rights of the surety. The question as to who are proper parties in these various proceedings, will, of course, depend upon the object and

nature of the action, and the circumstances of each case. If each of several sureties pays a portion of the debt from his individual money, each must maintain a separate action against his principal to recover the money paid by him, and a joint action by all the sureties will not lie.<sup>1</sup> But if the payment is made by the several sureties from a joint fund, they may join in an action for indemnity.<sup>2</sup> So, if a mortgage has been given to indemnify several guarantors against liability on a joint guaranty, they may all join in an action to foreclose the mortgage.<sup>3</sup> The heirs of a surety, who have been compelled to pay the amount of the debt for which their ancestor was liable as surety, may unite in an action against his principal to recover the moneys so paid.<sup>4</sup> If the co-sureties paid the debt of the principal by giving their joint note, they may join in an action against their principal.<sup>5</sup> If copartners become sureties in the firm name, and after the dissolution of the copartnership jointly pay the obligation of their principal, they may maintain a joint action for indemnity.<sup>6</sup> But where the executor of a deceased joint surety, who is also the partner of the surviving surety, unites with such surviving surety, in paying the debt out of the partnership fund, they cannot join in a suit for indemnity.<sup>7</sup> Where the principal, with intent to cheat and defraud persons whom he requests to sign a joint undertaking on an appeal, induces them to sign it by means of false representations, and the sureties are afterwards compelled to pay the amount, and

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<sup>1</sup> *Parker v. Leek*, 1 Stew. 523; *Sevier v. Roddie*, 51 Mo. 580; *Bunker v. Tufts*, 52 Me. 180; *Appleton v. Bascom*, 3 Met. (Mass.) 169; *Peabody v. Chapman*, 20 N. H. 418.

<sup>2</sup> *Pearson v. Parker*, 3 N. H. 366; *Ross v. Allen*, 67 Ill. 317.

<sup>3</sup> *Dye v. Mann*, 10 Mich. 291.

<sup>4</sup> *Snider v. Greathouse*, 16 Ark. 72.

<sup>5</sup> *Ross v. Allen*, 67 Ill. 317.

<sup>6</sup> *Day v. Swann*, 13 Me. 165.

<sup>7</sup> *Gould v. Gould*, 8 Cow. 168.



pay the same jointly, they may maintain a joint action against their principal to recover the amount so paid.<sup>1</sup>

### SECTION 2.—*Parties defendant.*

A surety who has paid a joint judgment against himself and his two principals, may recover the amount paid by him from both the principals. Having borne the burden of his principals, he stands, in many respects, in the place of a creditor, and may proceed against one or all of them for the whole amount paid.<sup>2</sup> So, a surety on a note made by two principals, may, on paying the note, recover the amount so paid of the surviving principal after the death of the other.<sup>3</sup>

A surety of a member of a copartnership on a bond given for the benefit of all the copartners, who has been obliged to pay the amount of the bond, must bring his action against the partner named in the bond alone. The law implies a promise to indemnify a surety only from the person whose legal liability is discharged, and not from other persons who may have been benefited by the payment.<sup>4</sup>

### SECTION 3.—*Voluntary payment.*

In an action by a surety against his principal to recover the moneys paid to the creditor, the principal may show that the payment by the surety was voluntary, and thus defeat the action.

Thus, if it is made to appear that the payment was voluntarily made by the plaintiff after the debt had become barred by the statute of limitations, so that he could

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<sup>1</sup> Bates v. Merrick, 2 Hun, 568.

<sup>2</sup> Westcott v. King, 14 Barb. 32.

<sup>3</sup> Riddle v. Bowman, 7 Foster (N. H.), 236.

<sup>4</sup> Tom v. Goodrich, 2 Johns. 213.

not have been compelled to pay it, this will be a perfect defense to the action.<sup>1</sup> In order that the surety may be entitled to recover the amount paid of the principal, it must appear that he was legally bound for the debt,<sup>2</sup> and that the principal was also at the same time under a legal obligation to pay the debt.<sup>3</sup>

As has been stated, a payment will not be deemed voluntary merely because it is made before any judgment has been recovered, or even any action commenced against the surety.<sup>4</sup>

#### SECTION 4.—*Default of surety.*

The fact that a surety did not appear and defend an action brought against him by the creditor, will be no defense to an action brought by a surety upon a bond of indemnity given to protect him, unless the default of the surety was the result of negligence, or an appearance would have availed the defendant.<sup>5</sup> And where a surety has let judgment go by default, and has paid the debt, he has his recourse against his principal, notwithstanding that the latter, when sued at the same court, by defending obtained a decree in his favor.<sup>6</sup> But it would be otherwise, if the surety had been notified of the defense.<sup>7</sup> If an action is brought against both principal and surety, and judgment recovered against both, the principal will not be permitted to show, in an action against him by the surety, that the original suit was not well defended.<sup>8</sup>

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<sup>1</sup> Hatchett v. Pegram, 21 La. Ann. 722; Randolph v. Randolph, 3 Rand. 490.

<sup>2</sup> Kimble v. Cummins, 3 Met. (Ky.) 327.

<sup>3</sup> Hollinsbee v. Ritchey, 49 Ind. 261.

<sup>4</sup> See *ante*, p. 346.

<sup>5</sup> Doran v. Davis, 43 Iowa, 86.

<sup>6</sup> Stinson v. Breenan, Cheves, 15.

<sup>7</sup> Stinson v. Breenan, Cheves, 15.

<sup>8</sup> Rice v. Rice, 14 B. Monr. (Ky.) 417.

And where the original action is brought against both principal and surety, and judgment is recovered against the surety alone, the record will not conclude the surety from showing, in an action against the principal, that the debt was that of the principal.<sup>1</sup>

SECTION 5.—*Disproving payment.*

In order to make a *prima facie* case against the principal, the surety must show an actual extinguishment of the liability of the principal to the creditor, by a payment made by the surety to the creditor, in money, or some other thing accepted by the creditor in satisfaction of his demand.<sup>2</sup> If the principal can disprove such payment, it will, of course, defeat the action. If the surety claims that he has paid his principal's debt by giving his own note, with security, in lieu of the note of his principal, the latter may show that the note given by the surety was not paid at the commencement of the action, and that the holder of the note did not agree to receive the note of the surety in payment or discharge of the original note.<sup>3</sup> Payment after action brought against the principal will not support the action.<sup>4</sup> If the surety claims to have given his absolute obligation in payment of that of his principal, and it can be made to appear that anything remains to be done between the surety and creditor to carry the arrangement between them completely into effect, this will be a good defense to the action.<sup>5</sup> And if the principal can show that the alleged payment was not for the full amount of the claim, or was made in some

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<sup>1</sup> *Peters v. Barnhill*, 1 Hill (S. C.), 234.

<sup>2</sup> See *ante*, p. 348; *Ingalls v. Dennett*, 6 Greenl. 79; *Pearson v. Parker*, 3 N. H. 366.

<sup>3</sup> *White v. Miller*, 47 Ind. 385.

<sup>4</sup> *Dennison v. Soper*, 33 Iowa, 183.

<sup>5</sup> *Hearne v. Keath*, 63 Mo. 84.

currency or property worth less than the face of the creditor's demand, he will reduce the amount of the recovery by so much as the payment actually made is less than the amount actually due the creditor.<sup>1</sup>

But whether a note given by a surety to the creditor, in payment of the claim against the principal debtor, can be collected or not, or whether the note was stamped or not, or was void by reason of the want of a stamp, or only voidable, are matters into which the principal debtor cannot inquire in an action against him by the surety.<sup>2</sup> The payment of an approved note, by which the surety binds himself to pay the amount in cash, is *prima facie* equivalent to a payment in cash, and, in the absence of proof to the contrary, binds the principal to pay to the surety the full amount of the note.<sup>3</sup>

SECTION 6.—*Disputing validity of the principal obligation.*

The general rule has been stated, that to entitle the surety to recover against his principal he must show that, at the time he paid the debt, the principal was under a legal obligation to pay it.<sup>4</sup> In a suit by a surety on a note given by one of two partners, in the firm name, the other may show that the partner giving the note had no power to bind the firm.<sup>5</sup> So, the defendant, in an action by the surety on a note, may show, in defense, that the note was given to secure a sum of money bet on an election.<sup>6</sup>

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<sup>1</sup> See *Butler v. Butler*, 8 W. Va. 674; *Bonney v. Seely*, 2 Wend. 481; *Kendrick v. Forney*, 22 Gratt. (Va.) 748; *Eaton v. Lambert*, 1 Neb. 339; *Owings v. Owings*, 3 J. J. Marsh. 590.

<sup>2</sup> *Hardin v. Branner*, 25 Iowa, 364.

<sup>3</sup> *Bone v. Torry*, 16 Ark. 83.

<sup>4</sup> *Hollinsbee v. Ritchey*, 49 Ind. 261.

<sup>5</sup> *Palmer v. Dodge*, 4 Ohio (N. S.), 21.

<sup>6</sup> *Harley v. Stapleton*, 24 Mo. 248.

But there may be cases in which the principal will be estopped from questioning the validity of the principal obligation. Thus, where an insufficient undertaking given on appeal has been accepted and received as proper and lawful, and the proceeding stayed by virtue of it, the principal will be estopped from questioning its validity in an action brought against him by the sureties thereon.<sup>1</sup>

In a suit by a surety upon a replevin bond for money paid by him on the bond, it is no defense that the plaintiff knew, when he signed the bond, that the replevin suit was groundless and malicious.<sup>2</sup>

A surety on a promissory note, who has been indemnified by mortgage, may, after the note has become due, and after he has notice that his principal will contest its payment on the ground of usury, pay the note, foreclose the mortgage, and collect what was legally due upon the note in the hands of the original creditor; but the principal will be entitled to interpose the same defense in the action by the surety that he might have interposed had the action been brought by the creditor.<sup>3</sup> It has been held, however, that a surety may recover of his principal, although the money was paid for him upon a usurious contract, made by the principal and which he might have avoided.<sup>4</sup> If the debt was paid by the surety after judgment against him and his principal, the latter cannot defend an action by the surety to recover the amount paid by him on the ground that part of the debt so paid was usurious,<sup>5</sup> though the judgment was by confession, and the payment made with knowledge of the usury.<sup>6</sup>

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<sup>1</sup> *Bates v. Merrick*, 2 Hun, 568.

<sup>2</sup> *Smith v. Rines*, 32 Me. 177.

<sup>3</sup> *Mims v. McDowell*, 4 Ga. 182. See *Hargraves v. Lewis*, 3 Kelly, 162.

<sup>4</sup> *Ford v. Keith*, 1 Mass. 138; *Johnson v. Johnson*, 11 Mass. 359.

<sup>5</sup> *Wade v. Green*, 3 Humph. 547.

<sup>6</sup> *Thurston v. Prentiss*, Walk. Ch. 529.

If the action is brought to recover the amount paid by the surety in a note, the principal may defend by showing a partnership in the transaction.<sup>1</sup>

SECTION 7.—*Indemnity given surety.*

The principal may show, in an action brought against him by the surety, that, at the time the plaintiff entered into the contract of suretyship, he agreed with his principal to receive certain property or securities for his indemnity, and to look only to such securities or property for his reimbursement for any loss which he might sustain by reason of the default of his principal, and that such property or securities were delivered to and received by him under such agreement.

But although a surety has taken security for his indemnity, he may, nevertheless, recover from the principal the amount paid in discharge of the principal's debt, unless it was agreed that he should be confined to his remedy on the security.<sup>2</sup> But if a surety holding collateral security for the debt, suffers judgment to be recovered against him, and his property to be sold under execution, he cannot recover from his principal the loss he may sustain by reason of the property bringing less than its value.<sup>3</sup>

SECTION 8.—*Amount of recovery.*

A surety who has paid a judgment recovered against himself and his principal, is entitled to recover of the latter whatever he has actually paid to satisfy the judgment, with legal interest, and no more.<sup>4</sup> If he has paid

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<sup>1</sup> Pollard v. Stanton, 5 Ala. 451.

<sup>2</sup> Cornwall v. Gould, 4 Pick. 444.

<sup>3</sup> Vance v. Lancaster, 3 Hay. 130.

<sup>4</sup> Eaton v. Lambert, 1 Neb. 339.

the debt of his principal in confederate money, he is only entitled to reimbursement in the same kind of funds, with interest from the day of payment.<sup>1</sup> If he has extinguished the debt of his principal by the payment of one-half of its amount, he can recover only the sum actually paid and the costs to which he has been subjected.<sup>2</sup>

A surety is entitled to recover from his principal the costs of a suit against himself which he has been compelled to pay,<sup>3</sup> unless he has interposed an unjust defense, in which case he is entitled only to the costs of a judgment by default.<sup>4</sup>

If the obligation of the principal debtor was a bond, the surety, on satisfying the bond, is entitled to recover of his principal no more than he has actually paid to satisfy the same.<sup>5</sup> If the surety has given his own note, with security, in lieu of the note of his principal, and has afterwards paid his own note, he is entitled to recover of his principal the rate of interest mentioned in the original note to the time of the payment of his own note.<sup>6</sup> If he has paid the debt of his principal in depreciated currency, he can recover from his principal only the market value of that currency at the time of payment, with interest thereon and necessary costs.<sup>7</sup>

If the surety pays more than the legal rate of interest on the debt of his principal after its maturity and the death of the principal, he cannot recover from the estate

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<sup>1</sup> *Kendrick v. Forney*, 22 Gratt. (Va.) 748.

<sup>2</sup> *Bonney v. Seely*, 2 Wend. 481.

<sup>3</sup> *Baker v. Martin*, 3 Barb. 634; *Elwood v. Diefendorf*, 5 Barb. 398; *Appar v. Hiler*, 4 Zab. (N. J.) 812; *Bancroft v. Pearce*, 1 Williams (Vt.), 668.

<sup>4</sup> *Holmes v. Weed*, 24 Barb. 546.

<sup>5</sup> *Martindale v. Brock*, 41 Md. 571.

<sup>6</sup> *White v. Miller*, 47 Ind. 385.

<sup>7</sup> *Butler v. Butler*, 8 W. Va. 674; *Jordan v. Adams*, 2 Eng. 348; *Hull v. Creswell*, 12 Gill & J. 36; *Crozier v. Grayson*, 4 J. J. Marsh. 514.

of the deceased, or his personal representatives, the excess of interest so paid;<sup>1</sup> and if a surety pays usurious interest to obtain time to pay the debt of the principal, he cannot recover it of the principal.<sup>2</sup> So, if a surety in a usurious contract pays the same, knowing it to be so tainted, he cannot recover the amount of the usury paid by him of his principal.<sup>3</sup>

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<sup>1</sup> *Lucking v. Gegg*, 12 Bush (Ky.), 298.

<sup>2</sup> *Thurston v. Prentiss*, 1 Mann. (Mich.) 193.

<sup>3</sup> *Hargraves v. Lewis*, 3 Kelly, 162.



## CHAPTER XXII.

### PRINCIPLES OF SURETYSHIP APPLIED TO PROPERTY AND TO PERSONS OTHER THAN SURETIES.

- SECTION I.—General application of the principles of suretyship.
- 2.—Nature of the contract of an accommodation indorser.
  - 3.—How far an indorser is regarded as a surety.
  - 4.—Contracts of drawers, indorsers and acceptors of bills.
  - 5.—Nature of the contract of an accommodation maker.
  - 6.—Principles of suretyship applied to the purchase and sale of partnership property.
  - 7.—Right of contribution and subrogation between partners, &c.
  - 8.—Principles of suretyship applied to the purchase or sale of incumbered lands.

#### SECTION I.—*General application of the principles of suretyship.*

The equitable principles which underlie the whole doctrine of suretyship have, from time to time, been applied by the courts to the determination of the rights of persons other than sureties, but who occupy analogous positions. The doctrine of subrogation or substitution, at first applied in behalf of those who were bound by the original security with the principal debtor, has been greatly extended, and the principle, modified to meet the circumstances of cases as they have arisen, has been applied in favor of volunteers intervening subsequent to the original obligation, and as between different classes of sureties, and in the marshaling of assets, and prescribing the order in which property and funds shall be subjected to the discharge of different classes of obligations, and as between different classes of creditors, so as to do substantial justice and equity in each case.<sup>1</sup>

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<sup>1</sup> See *Barnes v. Mott*, 64 N. Y. 397; *Bank of United States v. Winston*, 2 Brock. 252; *Ingalls v. Morgan*, 10 N. Y. 179.

The principles of the law of suretyship are daily applied by the courts to determine the rights of parties to accommodation paper, who appear in the contract they have entered into to have contracted as principals, to determine the rights and liabilities of stockholders of corporations, or of co-partners, after the sale of the co-partnership property, when the purchaser has assumed the partnership debts, and to determine the rights and liabilities of persons purchasing or selling lands incumbered by mortgages or judgments.

An exhaustive discussion of the application of these principles to these varying classes of persons and obligations, would require a greater amount of space than has been devoted to the discussion of the principles themselves, and would go beyond the limits of the present volume. But as the application of the principles of suretyship to other obligations is as important as the application of those principles to contracts of suretyship, an attempt will be made in this chapter to point out some of the cases, and the manner in which such application has been made.

## SECTION 2.—*Nature of the contract of an accommodation indorser.*

In legal effect, an indorsement of a negotiable promissory note creates a contract between the indorser and the holder, that if payment of the note is duly demanded of the maker at maturity, and payment refused, and due notice of the presentment and non-payment of the note is given to the indorser, he will then pay the note. In addition to this, the indorsement imports a guaranty by the indorser that the makers were competent to contract in the character in which, by the terms of the paper, they

purported to contract, and that the instrument itself and all the antecedent signatures thereon are genuine.<sup>1</sup>

The peculiarity or distinguishing feature of an accommodation indorsement is, that it creates a liability on the part of the indorser without any consideration moving to him. In this respect the contract resembles an ordinary suretyship. But, unlike a surety, an accommodation indorser, like any other, is discharged from liability by failure of notice of non-payment.<sup>2</sup>

An essential element in the contract created by an accommodation indorsement, is the limitation of time for which the indorser loans his credit, expressed in the time of payment fixed by the note. The undertaking of the accommodation indorser is, that the note shall be paid at maturity, and not that it shall be paid at any future time; and that he will be answerable to the person holding the note, at its maturity, according to his contract, if it be not then paid, if the holder then takes the proper steps to charge him. Before the maturity of the note, it may be transferred from hand to hand without limitation, and the contract of the indorser will be a binding contract between him and the person who is the holder of the note at its maturity. A person so taking the note before maturity will not be affected by the fact that it was made or indorsed without consideration.<sup>3</sup> But when the note has become due, and is dishonored, the rights and responsibilities of the parties thereto are fixed. The note has then lost the chief attribute of commercial paper, and is no longer adapted to the uses and purposes for which such paper is made. He who takes it thereafter, takes it with knowledge of its dishonor, with obvious reason to

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<sup>1</sup> *Erwin v. Downs*, 15 N. Y. 575; *Turnbull v. Bowyer*, 40 N. Y. 456; *Dalrymple v. Hillenbrand*, 62 N. Y. 5.

<sup>2</sup> *Braley v. Buchanan*, 21 Kansas, 274.

<sup>3</sup> *Chester v. Dorr*, 41 N. Y. 279.

believe that there exists some reason why it was not paid to the holder; and takes it with just such right to enforce it as such holder has, and no other. The accommodation indorser would not be liable, on his indorsement, to the person for whose accommodation the note was indorsed, if held by such person at its maturity; and neither will he be liable to one to whom such person has transferred the note after dishonor, though such transferee paid a full consideration. The defense of want of consideration attaches to the note after maturity into whose hands it may then come.<sup>1</sup>

SECTION 3.—*How far an indorser is regarded as a surety.*

An indorser is something more than a surety, and is liable in the first instance as a drawer. As between makers and indorsers the relation of principal and surety exists, and each prior party is a principal for each subsequent party. The rights and duties of indorsers and sureties are so alike that most acts which will discharge the one will also the other. But there are some distinctions important to observe lest a principle exclusively applicable to one be perverted. For instance, without due demand and notice at maturity of a note, an indorser will be discharged, while a surety continues liable upon his contract, though the creditor sleeps.<sup>2</sup> A surety may spur the creditor into activity by notice to pursue the principal debtor, on pain, for neglect, that the surety will be no longer bound. This right is not given to an indorser. He cannot call upon the holder of a protested

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<sup>1</sup> *Chester v. Dorr*, 41 N. Y. 279.

<sup>2</sup> *Stephens v. Monongahela Nat. Bank*, 88 Penn. St. 157; S. C. 32 Am. R. 438.

note to sue the drawer, and, if he refuses, thereby relieve himself. If he wishes instant recourse to the principal it is his duty to pay the note and sue for himself.<sup>1</sup> While an accommodation indorser may be regarded as a surety in some cases and under certain circumstances, and has all the rights applicable to that relationship, yet as between him and a *bona fide* holder, when his liability has become fixed, he becomes the principal debtor, and if he desires the benefit of any security held by the creditor, he must pay up the debt, fulfill the contract, and enforce the right of subrogation to the holder as to securities held by him. He cannot compel the holder to sue the maker first, or to enforce his security, and, in the absence of an additional and controlling equity, to resort to a collateral security.<sup>2</sup> In respect to third parties and *bona fide* holders, the obligations of accommodation indorsers are co-extensive with those of indorsers of business paper.<sup>3</sup> If the creditor has had collateral security placed in his hands to secure him in his dealings with a person who intends to become his debtor, and afterwards discounts the notes of such person, and also buys an overdue note against the same person, on the sale of the collateral securities, the accommodation indorsers on the notes so discounted have the right to have the proceeds of the collaterals applied to the satisfaction of the notes indorsed by them, in preference to the note purchased by the creditor. According to general principles of law, the indorsers, being sureties, were at once entitled to be subrogated to the claim of the creditor. The collaterals become a trust fund for the payment of the notes on which they were

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<sup>1</sup> *Stephens v. Monongahela Nat. Bank*, 88 Penn. St. 157; S. C. 32 Am. R. 438; *Beebe v. West Branch Bank*, 7 W. & S. 375.

<sup>2</sup> *First Nat. Bank v. Wood*, 71 N. Y. 405. See *Ross v. Jones*, 22 Wall. 576, 592. In *Re Babcock*, 3 Story, 393, 398, 399.

<sup>3</sup> *Crane v. Trudean*, 19 La. Ann. 307.

indorsers, and their right of subrogation attached as soon as their liability attached.<sup>1</sup>

The holder of a bill or note cannot deal with the maker or acceptor in such a way as to deprive the drawer or indorser of any remedy he may have upon the instrument. He cannot discharge the party primarily liable, and then sue the indorser, because the latter would in this way be deprived of his remedy over. He cannot extend the time of payment without the assent of the drawer or indorser, for this would change the contract. The same is true of sureties.<sup>2</sup> But these rights or restrictions upon the power of the holder of the paper are by no means peculiar to sureties. The holder cannot release one of the joint makers of a note without discharging all, and no man's contract can be altered without his assent, be he maker or indorser.

When a person becomes a party to a bill or note, at the request and for the benefit of another, the relation of principal and surety exists, and must be regarded by all other parties or holders affected with notice.<sup>3</sup> But when the note is indorsed for a consideration received by the indorser, and for his own benefit exclusively, without reference to the convenience or wishes of the maker, the indorser does not occupy the position of surety for the maker in such a sense as will entitle him to an account from the holder of the notes, for the value of any collateral security taken by him from the maker, on his own account, and subsequently surrendered in good faith and without payment.<sup>4</sup>

The surrender of void and valueless security by the

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<sup>1</sup> *National Exchange Bank v. Silliman*, 65 N. Y. 475.

<sup>2</sup> *Pitts v. Congdon*, 2 N. Y. 352.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

holder of a note will not discharge an indorser thereon;<sup>1</sup> nor will the indorser be discharged by the fact that the holder entered into a composition deed by which he discharged the maker upon the receipt of a portion of the debt, if the remedy of the holder against the indorser is expressly reserved in the deed.<sup>2</sup> But the indorser would be discharged in such case, if the remedy against him was not so reserved.<sup>3</sup>

An extension of time given by the holder to the maker will not discharge the indorser, if the holder reserves his rights against the latter;<sup>4</sup> nor will an agreement for an extension of time, made without consideration, have that effect.<sup>5</sup>

Under the Code of Tennessee, an indorser, whether for accommodation or for value, is entitled to provisions therein in favor of sureties;<sup>6</sup> and the drawer of a bill of exchange, for the accommodation of the payee, is a surety of the latter, within the Indiana statute, providing for remedies of sureties against their principals, and, as such, may, upon proper application, have execution directed first against the property of his principal.<sup>7</sup>

If an accommodation indorser of a negotiable note pays it after protest, he has the same rights as a surety to full indemnity for his payment on account of his principal, and no greater.<sup>8</sup> If he seeks to recover from his

<sup>1</sup> *Union Nat. Bank v. Cooley*, 27 La. Ann. 202.

<sup>2</sup> *Tobey v. Ellis*, 114 Mass. 120.

<sup>3</sup> *Perry v. Armstrong*, 39 N. H. 583.

<sup>4</sup> *Hagey v. Hill*, 75 Penn. St. 108; *Hubbell v. Carpenter*, 5 N. Y. 171; *Morse v. Huntington*, 40 Vt. 488.

<sup>5</sup> *Hazzard v. White*, 26 Ark. 155; *Wiley v. Hight*, 39 Mo. 130; *Nightingale v. Meginnis*, 34 N. J. Law, 461; *Schlusell v. Warren*, 2 Oregon, 17; *Van Rensselaer v. Kirkpatrick*, 46 Barb. 194.

<sup>6</sup> *Bryant v. Rudisell*, 4 Heisk. (Tenn.) 656.

<sup>7</sup> *Lacy v. Lafton*, 26 Ind. 324.

<sup>8</sup> *Burton v. Slaughter*, 26 Gratt. 914.

principal the amount of the note, on the ground that he has paid it by another note, he must show that the second note was given under such circumstances as to constitute payment.<sup>1</sup>

As between themselves, successive accommodation indorsers are not co-sureties, unless by force of an express understanding or agreement between them to that effect.<sup>2</sup> But when a note, payable in bank, is indorsed under an express agreement or distinct understanding that the payee will also indorse it, for the purpose of having it discounted to raise money for the benefit of the maker, the relation of co-surety is created between the indorser and payee, with liability to contribution when either is obliged to pay the debt.<sup>3</sup>

#### SECTION 4.—*Contracts of drawers, indorsers and acceptors of bills.*

As a general rule, when a person puts his name on negotiable paper he will be deemed to have bound himself only according to the import of what he writes, and cannot be subjected to a different obligation by parol evidence. When the drawee of a bill of exchange refuses to accept or pay, the drawer and indorsers are liable to the holder in an action on the bill. After acceptance, the drawee is *prima facie* the principal debtor, and the drawer and indorsers are regarded as mere sureties. Consequently, no action will lie against the latter in the name of the acceptor. But when the drawee accepts and pays for the accommodation of the drawer, he may recover the amount paid in an action for money paid to the

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<sup>1</sup> *Lentell v. Getchell*, 59 Me. 135. See *Nightingale v. Chafee*, 11 R. I. 609; S. C. 23 Am. R. 531.

<sup>2</sup> *Stillwell v. How*, 46 Mo. 589; *McCune v. Belt*, 45 Mo. 174.

<sup>3</sup> *Armstrong v. Cook*, 30 Ind. 22. See *Sharp v. Fickle*, 30 Ind. 456.



drawer's use. If, however, the acceptance be made with knowledge of the fact that one of the drawers signed merely as surety, he will not be liable to the acceptor whether the relation between the drawers appears upon the face of the bill or not.<sup>1</sup> It is also an elementary rule of law which has been adhered to for more than a century, without question, that the drawees of a bill are held to a knowledge of the signature of their correspondents, the drawers, and that by accepting and paying such bill they vouch for the genuineness of such signatures, and can neither repudiate the acceptance nor recover the money paid, though such signatures are forged.<sup>2</sup> The holders of the bill, claiming to be entitled to receive its amount from the drawees, are held to a knowledge of their own title and the genuineness of the indorsements, and of every part of the bill other than the signature of the drawers, within the general principle which makes every party to a promissory note or bill of exchange, a guarantor of the genuineness of every preceding indorsement, and of the genuineness of the instrument.<sup>3</sup> This rule will not, however, be applied against an indorser in favor of a holder of a note who has procured the indorsement of a forged note with knowledge of the forgery, and upon a representation to the indorser that it was genuine; nor in favor of one who received the note after maturity, and

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<sup>1</sup> *Suydam v. Westfall*, 4 Hill, 211. See *Wilson v. Isbell*, 45 Ala. 142; *Diversity v. Moor*, 22 Ill. 330; *Swope v. Ross*, 40 Penn. St. 186; and see *Turner v. Browder*, 5 Bush (Ky.), 216.

<sup>2</sup> *Price v. Neal*, 3 Burr, 1354; *White v. Continental Nat. Bank*, 64 N. Y. 316; *National Park Bank v. Ninth Nat. Bank*, 46 N. Y. 77; *Marine Nat. Bank v. Nat. City Bank*, 59 N. Y. 67; *Merchants' Bank v. State Bank*, 10 Wall. 604; *Espy v. Bank of Cincinnati*, 18 Wall. 605; *Goddard v. Merchants' Bank*, 4 N. Y. 147; *Bank of Commerce v. Union Bank*, 3 N. Y. 230.

<sup>3</sup> *White v. Continental Nat. Bank*, 64 N. Y. 316, 320; *Erwin v. Downs*, 15 N. Y. 575; *Turnbull v. Bowyer*, 40 N. Y. 456; *Story on Prom. Notes*, §§ 135, 379, 380, 381; *Condon v. Pearce*, 43 Md. 83; *Chambers v. Union Nat. Bank*, 78 Penn. St. 205; *McKleroy v. Southern Bank*, 14 La. Ann. 458.

without consideration, from one who so procured the indorsement.<sup>1</sup>

In accordance with the general doctrine in respect to the discharge of sureties by the giving of time to the principal debtor, it is held that if, after a bill becomes due, the holder, for a sufficient consideration, agrees with the drawee of the bill, to give him further time for payment, without the consent of the other parties entitled to sue such drawee, they will, as a general rule, be discharged from all liability.<sup>2</sup> So, also, if the holder, without such consideration, takes fresh security or a new bill, and agrees to give time without the consent of the other parties.<sup>3</sup> But a mere agreement to delay without consideration will not bind the holder, and, therefore, will not discharge the other parties.<sup>4</sup>

Payment of a bill of exchange by the acceptor extinguishes the debt, leaving no right of action against the drawer and indorser, who are but sureties, except when the acceptance was under protest.<sup>5</sup> In the absence of proof of an agreement between the acceptor and the indorser of a bill, that in case of default of payment by the maker the parties shall be liable to each other as sureties, the liability of the acceptor and indorser attaches in the order in which their names appear on the bill; and in case of payment by the acceptor, he being the person primarily liable, he has no right of contribution from the indorser.<sup>6</sup>

Although, at law, one who accepts a bill for the accom-

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<sup>1</sup> *Turner v. Keller*, 66 N. Y. 66.

<sup>2</sup> *Fridenberg v. Robinson*, 14 Fla. 130; *Mottram v. Mills*, 2 Sandf. (N. Y.) 189.

<sup>3</sup> *Fridenberg v. Robinson*, 14 Fla. 130.

<sup>4</sup> *Friedenberg v. Robinson*, 14 Fla. 130. See *First Nat. Bank v. Church*, 4 Thomp. & Co. (N. Y.) 10.

<sup>5</sup> *Swope v. Ross*, 40 Penn. St. 186.

<sup>6</sup> *Robinson v. Kilbreth*, 1 Bond, 592.

modation of the drawer is regarded as the principal debtor, as between him and a *bona fide* holder of the accepted bill, yet, as between such acceptor and the drawer, the former stands in the relation of surety, and in equity is entitled on payment of the bill to be subrogated to the position of the holder in respect to any securities of the drawer held by him,<sup>1</sup> and is also entitled to a transfer of the bill itself, and to maintain an action upon it.<sup>2</sup> A release of the drawer by the holder for value of an accommodation bill, will not discharge the accommodation acceptor, even though he knew when the release was given that the acceptance was without consideration ;<sup>3</sup> nor will the release of the acceptor by the holder discharge the drawer.<sup>4</sup>

If one of the several drawers of a bill joins in it as principal, and the others as sureties for him, and the drawee, with knowledge of the facts, accepts and pays it without any funds of the drawers in his hands, he may maintain an action against them all for the money so paid, there being an implied obligation on the part of all the drawers, sureties as well as principal, to indemnify him.<sup>5</sup> But the mere fact of acceptance without payment, gives him no right of action, either directly against the drawers or indirectly by bill in equity to foreclose a mortgage executed by them to secure him as acceptor.<sup>6</sup> And until payment of the bill the accommodation acceptor of a bill

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<sup>1</sup> Bank of Toronto *v.* Hunter, 4 Bosw. (N. Y.) 646.

<sup>2</sup> Sublett *v.* McKinney, 79 Texas, 438.

<sup>3</sup> Howard Banking Co. *v.* Welchman, 6 Bosw. 280. See Hoge *v.* Lansing, 35 N. Y. 136; Strong *v.* Northampton Banking Co. 17 C. B. 201; Farmers' & Mechanics' Bank *v.* Rathbone, 26 Vt. 19.

<sup>4</sup> Parks *v.* Ingram, 2 Foster (N. H.), 283.

<sup>5</sup> Dickerson *v.* Turner, 15 Ind. 4.

<sup>6</sup> Planters' Bank *v.* Douglass 2 Head (Tenn.), 699; Suydam *v.* Coombs, 3 Green, 133.

is a mere surety and not a creditor, and, therefore, cannot have an attachment against the drawer.<sup>1</sup>

SECTION 5.—*Nature of the contract of an accommodation maker.*

The maker of a negotiable note undertakes to pay it, according to its tenor, to any holder to whom it may be due. An accommodation maker is equally liable except to the payee. In respect to third persons the law considers him precisely in the character he has assumed, and will not permit him to allege that the paper to which he gave his name was an imposition, nor to gainsay its reality by proof that it was a fiction. Whoever draws a promissory note for the purpose of negotiation must stand by it. Having placed himself in the situation of a principal, he cannot escape liability by alleging that he was a surety. The fact that the holder knew he had received no value will not relieve him, for, by placing himself in front, the holder has the right to suppose that he was willing to abide the consequences.<sup>2</sup> The principles stated do not prohibit an accommodation maker from insisting, in turn, upon being held to the precise terms of his contract. If a person, who discounts a note, is informed, at the time, that it was made for the accommodation of the seller and indorser, he can hold the maker only as a surety, and if, when the note falls due, he gives an extension of time to the indorser without the assent of the maker, the latter is discharged.<sup>3</sup> A joint maker of a promissory note, who signed it for accommodation mere-

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<sup>1</sup> Henderson v. Thornton, 37 Miss. 448; Todd v. Shouse, 14 La. Ann. 426.

<sup>2</sup> Stephens v. Monongahela Nat. Bank, 88 Penn. St. 157; Bank of Montgomery County v. Walker, 9 S. & R. 229; Walker v. Bank, 12 S. & R. 382.

<sup>3</sup> Valley Nat. Bank v. Meyers, 17 Bankr. Reg. 257.

ly, is released by an extension granted without his knowledge or consent.<sup>1</sup>

SECTION 6.—*Principles of suretyship applied to the purchase and sale of partnership property.*

It has been already stated that where one of two copartners purchases the interest of the other in the partnership property, and assumes and agrees to pay the partnership debts, the purchaser, as to such debts, becomes, in equity, the principal debtor, and the vendor the surety ; and that firm creditors, dealing with the purchaser with notice of the transfer, are bound to observe the relationship at their peril.<sup>2</sup> Applying the principles applicable to ordinary cases of suretyship to this class of cases, it follows that, if a creditor of a partnership after dissolution thereof, knowing that one of the several copartners has agreed with the others to assume and pay the debts of the firm, takes, in payment of his debt, the negotiable note of the partner who has assumed the firm debt, and thus extends the time of payment, he thereby discharges the other partners.<sup>3</sup> So, if the outgoing partner requests the creditor to collect his claim of the partner who has become the principal debtor, and he refuses and neglects so to do while the principal is solvent and able to pay, he cannot, after the principal has become insolvent, recover the amount of the debt from the partner who has become the surety.<sup>4</sup>

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<sup>1</sup> Barron v. Cady, 40 Mich. 259.

<sup>2</sup> Colgrove v. Tallman, 67 N. Y. 95; Oakley v. Pasheler, 10 Bligh, New Par. R. 548, 590; Millerd v. Thorn, 56 N. Y. 402; Savage v. Putnam, 32 N. Y. 501; Morss v. Gleason, 64 N. Y. 204; Kinney v. McCullough, 1 Sandf. Ch. 370.

<sup>3</sup> Millerd v. Thorn, 56 N. Y. 402; Arnold v. Camp, 12 Johns. 409; Waydell v. Luer, 3 Denio, 410.

<sup>4</sup> Colgrove v. Tallman, 67 N. Y. 95.

Where a member of a firm transfers his interest therein to a third person who is received into the firm as a partner in his stead, the outgoing partner thereafter occupies the position of surety for the firm debts to the extent that the assets of the firm are sufficient for their payment. Such assets are held by the new firm charged with a trust for the payment of the debts of the old firm which became dissolved by the transfer.<sup>1</sup> If the continuing partners pay a debt due a creditor of the old firm, they pay as principals, and the retiring partner, being merely a surety for the debt, is thereby discharged. Such payment gives no right of contribution against the retiring partner.<sup>2</sup>

Where a third party purchases the interest of one of the partners in a partnership and takes his place in the firm, agreeing that he will assume the share of the liabilities of the firm which belong to the outgoing partner, but not agreeing to pay at once all the debts of the firm, the intent and meaning of such assumption is to indemnify the outgoing partner. If the latter is obliged to pay any of the old debts of the firm, under such circumstances, then, and then only, is he entitled to maintain an action against the purchaser.<sup>3</sup> But, where a person, carrying on a business, takes in a partner and transfers his assets and stock in trade to the firm in consideration of an agreement of the firm to assume and pay certain specified debts incurred in the business, and to apply the assets first to the payment of said debts, the agreement is to be deemed as made for the benefit of the creditors holding the claims specified, and any such creditor may maintain an action against the firm upon such agreement.<sup>4</sup> The

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<sup>1</sup> *Morss v. Gleason*, 64 N. Y. 204; *Savage v. Putnam*, 32 N. Y. 501.

<sup>2</sup> *Savage v. Putnam*, 32 N. Y. 501.

<sup>3</sup> *Coleman v. Lansing*, 65 Barb. 54.

<sup>4</sup> *Arnold v. Nichols*, 64 N. Y. 117.

promise to assume the specified debts of the vendor in such case is not made to exonerate the vendor from the payment of his debts, and is not primarily nor directly for his benefit, as his property is to be taken to pay the debts, and he is still liable as one of the principals to pay them. The case is unlike that presented where, upon the dissolution of a firm, one partner executes to another a bond with a surety conditioned for the payment by the partner executing it of all the firm debts. In such case the liability of the obligors is to the obligee only, not to the creditors, and a firm creditor cannot maintain an action thereon to recover his indebtedness of the obligors.<sup>1</sup> But, if a person purchases property subject to partnership debts of a member of a firm, and agrees in writing to assume and pay such debts as part of the purchase price, the purchaser thereby recognizes the equitable lien of the partnership creditor, and the creditors may file a bill to compel such payment without first putting their claims in judgment.<sup>2</sup>

SECTION 7.—*Right of contribution and subrogation between partners, &c.*

The cases in which a recovery can be had at law, by way of contribution between partners, are very few. The remedy is usually sought in equity where an account of all the partnership transaction can be taken. After a division of the assets of a firm, one partner, who has been compelled to pay outstanding debts, may sue for contribution;<sup>3</sup> and a part of the members of an insolvent voluntary association, whose assets have been disposed of, may file a bill in equity for an account, and to compel

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<sup>1</sup> Merrill v. Green, 55 N. Y. 270. See Hinman v. Bowen, 3 Hun, 192; Mackintosh v. Fatman, 38 How. 145.

<sup>2</sup> Olson v. Morrison, 29 Mich. 395.

<sup>3</sup> Eakin v. Knox, 6 Rich. (S. C.) 14.

each solvent member to pay his *pro rata* share of the indebtedness without first paying the debts and taking the risk of making the defendants contribute.<sup>1</sup>

If one partner sells out to his copartners under covenant that they will pay the firm debts and indemnify him against them, and afterwards pays debts and becomes their surety, he is entitled to come in as a creditor and be subrogated to the rights of the creditor he has paid.<sup>2</sup> But a partner who has paid a firm debt, is not generally entitled to subrogation against his copartner until an account has been settled between them.<sup>3</sup>

To entitle one partner to recover at law of another partner contribution for his proportion of the debts of the firm paid by him since dissolution, it must appear that such other partner was notified of such payment before suit.<sup>4</sup>

SECTION 8.—*Principles of suretyship applied to the purchase or sale of incumbered lands.*

When lands incumbered by a judgment, are conveyed with covenants of warranty to a purchaser for full value, the grantee and his successors in interest occupy a position similar to that of sureties for the judgment-debtor, and are entitled to the same equities. A release by the judgment-creditor, without their consent and with knowledge of their rights, of any security which, in equity, they would be entitled on payment of the judgment, discharges the lien of the judgment. Thus, where, after such conveyance, the judgment debtor gives an undertaking on appeal from the judgment, whereby the judgment is secured and its enforcement stayed, and the judgment-creditor after the affirmance of the judgment, with full

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<sup>1</sup> Hodgson v. Baldwin, 65 Ill. 532.

<sup>2</sup> Merrill v. Green, 55 N. Y. 270.

<sup>3</sup> Fessler v. Hickernell, 82 Penn. St. 150.

<sup>4</sup> Dakin v. Graves, 48 N. H. 45.



knowledge of the equitable rights of the owner and without his consent, releases the sureties in the undertaking, the lien of the judgment is discharged.<sup>1</sup> In such case the purchaser of the land incumbered by the judgment, standing in the position of a surety of the judgment-debtor, is entitled to be subrogated to all the rights of the creditor as against all subsequent sureties on payment of the judgment. The judgment-creditor having a remedy against the sureties in the undertaking given upon the appeal from the judgment, was bound to hold it for the benefit of any person standing in the equitable relation of surety for the payment of the judgment, either by reason of his personal obligation or because his property is bound; and the judgment-creditor by discharging the undertaking, held, not only for his benefit, but for the benefit of the purchaser occupying the position of prior surety for the payment of the judgment, and thereby depriving the purchaser of the benefit of that security, discharged the land from the lien of the judgment.<sup>2</sup> As between the purchaser or his successors in interest and the sureties in the undertaking on appeal, the purchaser or his successors occupy the position of an original surety for the judgment and the sureties in the undertaking the position of subsequent sureties. The latter sureties are primarily liable as between themselves and the original sureties, and the release of the subsequent sureties discharges the former, because it deprives them of a security to which they would otherwise have been entitled. The position of the purchaser and the sureties in the undertaking, and their respective rights and liabilities, are similar to those of a surety for the original debt, and of the sureties in an undertaking for a stay of execution under the statutes of certain States;<sup>3</sup> and the creditor is held accountable for

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<sup>1</sup> *Barnes v. Mott*, 64 N. Y. 397; S. C. 21 Am. R. 625.

<sup>2</sup> *Id.*

<sup>3</sup> See *Burns v. Huntington Bank*, 1 Penn. 395; *Pott v. Nathans*, 1 W. &

his dealings with such sureties with knowledge of the relation.

If, in the case hereinbefore stated, there had been other lands incumbered by the same judgment, whether owned by the judgment debtor or conveyed by him to others, the purchaser of a portion of such lands could, in equity, compel the sale of the lands in that order which would preserve the rights and equities of all; that is, he could compel the sale of the lands owned by the debtor first in order, and then those which have been sold by the debtor in the inverse order of alienation.<sup>1</sup> This has been almost universally held in cases where land, which is subject to the lien of a mortgage or other paramount incumbrance, has been sold in parcels successively to different persons.<sup>2</sup> Where sufficient is realized by the sale of one or more parcels to pay the debt and costs, the remaining parcels are, of course, discharged of the lien.

So, where a mortgage upon several lots is a common burden, and the mortgagee, with knowledge that the mortgagor has sold a part of the lots, releases one of the mortgaged lots, he thereby discharges the lots sold by the

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S. 155; *Schnitzel's Appeal*, 49 Penn. St. 23; *McCormick's Adm'rs v. Irwin*, 35 Penn. St. 112; *Hinckley v. Kreitz*, 58 N. Y. 583.

<sup>1</sup> See *Barnes v. Mott*, 64 N. Y. 397, 402; *Howard Ins. Co. v. Halsey*, 8 N. Y. 271; *Guion v. Knapp*, 6 Paige, 25; *Gouverneur v. Lynch*, 2 Paige, 300.

<sup>2</sup> *James v. Hubbard*, 1 Paige, 228; *Chapman v. West*, 17 N. Y. 125; *Jones v. Myrick*, 8 Gratt. 179; *Cooper v. Bigly*, 13 Mich. 463; *Cowden's Estate*, 1 Barr. 267; *Inglehart v. Crane*, 42 Ill. 372; *Hunt v. Mansfield*, 31 Conn. 478; *Allen v. Clark*, 17 Pick. 47; *Gaskill v. Gaskill*, 2 Beasley, 400; *Commercial Bank v. Western Reserve Bank*, 11 Ohio, 444; *Brown v. Simmons*, 44 N. H. 475; *Gates v. Adams*, 24 Vt. 71; *Holden v. Pike*, 24 Me. 427; *Payne v. Avery*, 21 Mich. 524; *Lock v. Fulford*, 52 Ill. 166; *McCullum v. Turpie*, 32 Ind. 146. The principle is irrespective of the origin or nature of the incumbrance. Where real estate is charged by will with debts or legacies, and sold successively in parcels to different persons, each is chargeable in the inverse order of alienation. *Nellons v. Truax*, 6 Ohio (N. S.), 97; *Jenkins v. Freyer*, 4 Paige, 47.

mortgagor to the extent of the *pro rata* value of the portion released.<sup>1</sup>

Where a judgment debtor, with the knowledge of the creditor, sells land upon which the judgment is a lien, and delivers to the creditor the notes received in payment of the purchase price as security for the judgment debt, the duty is imposed upon the creditor, in equity, to apply the proceeds of the notes in payment of the judgment, before resorting to the lands so sold and paid for; and if the creditor, under such circumstances, surrenders to the judgment debtor sufficient of such notes to have satisfied the debt, the purchasers of the land are entitled to have it discharged from the lien of the judgment.<sup>2</sup> The courts, in such cases, apply the analogous and familiar principle of the doctrine of suretyship, that where a creditor relinquishes to a principal debtor other direct or collateral securities or remedies which he might have resorted to for the exoneration of the surety, he deprives himself of the right to resort to the surety, for the reason that he has subverted the right

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<sup>1</sup> Taylor v. Short, 27 Iowa, 361; S. C. 1 Am. R. 280; Stevens v. Cooper, 1 Johns. Ch. 425; Guion v. Knapp, 6 Paige, 35, 42; Denster v. McCamus, 14 Wis. 307; Parkman v. Welch, 19 Pick. 231.

It is a general rule, that, upon alienation by the mortgagor of a part of the lands mortgaged, an equity arises in favor of the alienee to have the mortgage first satisfied out of the lands remaining in the hands of the grantor. Johnson v. Williams, 4 Minn. 260; Mobile, &c. Co. v. Huder, 35 Ala. 713; La Farge Fire Ins. Co. v. Bell, 22 Barb. 54. Unless the alienee agrees with the mortgagor that the part which he buys shall be subject to the mortgage. Engle v. Haines, 1 Halst. Ch. (N. J.) 186; Ross v. Haines, Id. 632. And if the mortgagee releases such remaining lands, his security is cancelled to the extent of the value of such lands, and he can collect only the balance out of the lands of the alienee. Johnson v. Williams, 4 Minn. 260; La Farge Fire Ins. Co. v. Bell, 22 Barb. 54; Gaskill v. Sine, 2 Beasley (N. J.), 400.

But otherwise, if, at the time of executing the release, the mortgagee had no notice of the alienation. La Farge Fire Ins. Co. v. Bell, 22 Barb. 54; James v. Brown, 11 Mich. 25.

<sup>2</sup> Ingalls v. Morgan, 10 N. Y. 178.

of subrogation to which the surety would have been entitled on payment of the principal debt; for, although the purchasers of the land do not stand in the precise position of sureties, they occupy a position in many respects similar, and, if compelled to pay the judgment to save their lands, would have been entitled to the notes held by the creditor by way of subrogation, if no other equities intervened. The courts also apply to such cases the equitable doctrine, that where a creditor has a lien upon two funds for the security of his debt, and another party has an interest in one only, without any right to resort to the other, equity will compel the creditor to take his satisfaction out of the fund upon which he alone has an interest, so that both parties may, if possible, escape without injury.<sup>1</sup>

Thus, where a mortgage has been given on six lots of land, and afterwards one of these lots is sold, subject to the payment of a proportionate part of the mortgage debt, and afterwards the owner of the mortgage released the remaining lots on receiving other security for their proportion of the debt, it was held that the lot first sold was discharged from that portion of the debt which was equitably chargeable upon the lot released.<sup>2</sup> So, where a judgment creditor released a lot of land on which his judgment was a lien, to one who had purchased it of the debtor, and afterwards attempted to enforce his judgment against another parcel which the judgment debtor had sold at a later period, the court compelled the creditor to deduct from his judgment an amount equal to the value

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<sup>1</sup> See *Wright v. Nutt*, 1 H. Bl. 136; *Cheesebrough v. Millard*, 1 Johns. Ch. 409; *Stevens v. Cooper*, 1 Johns. Ch. 425; *Hays v. Ward*, 4 Johns. Ch. 123; *Evertson v. Booth*, 19 Johns. 486; *James v. Hubbard*, 1 Paige, 235.

<sup>2</sup> *Stevens v. Cooper*, 1 Johns. Ch. 425. See, also, *Hays v. Ward*, 4 Johns. Ch. 123; *Stillman v. Stillman*, 21 N. J. Eq. 126; *James v. Brown*, 11 Mich. 25; *Gaskill v. Sine*, 2 Beasley (N. J.), 400.

of the lot released.<sup>1</sup> So, where a judgment creditor had taken the debtor's goods on execution, and, while the execution was in life, a third person loaned the debtor money on a mortgage on his lands, the court held that the creditor, knowing the existence of the mortgage, lost his priority against the land by withdrawing his execution and allowing the property levied on to be sold under other executions.<sup>2</sup>

These cases are but an application of the familiar principle, that a creditor who releases a security held by him for his debt, to that extent releases the surety for the debt.

The courts also apply to this class of cases another general rule applicable to cases of pure suretyship, that the creditor is not to be prejudiced by any acts done in good faith and without knowledge of the rights of others, although the effect of these acts is to deprive such other persons of their right of substitution.<sup>3</sup> The right to have incumbered lands sold in the inverse order of alienation is an equitable, and not a legal right; and the mortgagee, when applied to for a release of a part of the mortgaged premises, is not bound at his peril to ascertain whether any part thereof has been aliened. He must have sufficient notice to put him upon inquiry, in order to require him to regard the equitable right.<sup>4</sup>

The doctrine of suretyship has also been extended, as has been shown, to conveyances of land subject to a mortgage which the grantee assumes to pay.<sup>5</sup>

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<sup>1</sup> *James v. Hubbard*, 1 Paige, 235.

<sup>2</sup> *Depeyster v. Hildreth*, 2 Barb. Ch. 109.

<sup>3</sup> *Cheesebrough v. Millard*, 1 Johns. Ch. 409, 414.

<sup>4</sup> *Howard Ins. Co. v. Halsey*, 8 N. Y. 271; *Guion v. Knapp*, 6 Paige, 35; *Stuyvesant v. Hall*, 2 Barb. Ch. 151; *James v. Brown*, 11 Mich. 25.

<sup>5</sup> *Paine v. Jones*, 14 Hun, 577; *Rubens v. Prindle*, 44 Barb. 336; *Johnson v. Zink*, 52 Barb. 396; *Russell v. Pistor*, 7 N. Y. 171; *Huyler v. Attwood*, 26 N. J. Eq. 504; *Rardin v. Walpole*, 38 Ind. 146.

A grantee, by taking a conveyance of lands subject to a mortgage debt for which his grantor was personally liable, and assuming the payment of the same as part of the consideration of the conveyance, becomes personally liable to the holder of the mortgage for the mortgage debt; and the grantor being also personally liable for the same debt, the grantee, by assuming it, becomes bound to indemnify the grantor against his liability. The amount allowed to the grantee out of the purchase-money, by reason of his assumption of the mortgage, is a fund in the hands of the grantee applicable to the payment of the mortgage in exoneration of the grantor. As between the grantor and grantee, the grantee is the principal debtor, and the grantor is his surety. If the grantee in turn conveys the land to a third person, who, in like manner, assumes the payment of the mortgage, the land is, both as to the original grantor and grantee, the primary fund for the payment of the mortgage; and as against the original grantee, the grantor is entitled to have it so applied before being called upon to respond to his liability as surety for the original grantee, so that he may not be compelled to advance more than the deficiency which may arise on a sale of the mortgaged premises. If the grantor pays this deficiency, his grantee is liable to him for the amount so paid, including the costs of the foreclosure.<sup>1</sup>

The grantor being merely the surety of the grantee, if the holder of the mortgage enters into any arrangement with the grantee, by which the terms of the mortgage contract is changed, the grantor is released from all

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<sup>1</sup> *Comstock v. Drohan*, 71 N. Y. 9. See *Russell v. Pistor*, 7 N. Y. 171; *Halsey v. Reed*, 9 Paige, 446; *Marsh v. Pike*, 10 Paige, 595; *Tice v. Annin*, 2 Johns. Ch. 125; *McKinstrey v. Curtiss*, 10 Paige, 502; *Vanderkemp v. Shelton*, 11 Paige, 28; *Northrop v. Hill*, 57 N. Y. 351, 359; *Cornell v. Prescott*, 2 Barb. 16.

liability for the deficiency.<sup>1</sup> Thus, if a person executes a bond and mortgage on his lands, containing a clause that the mortgagee would, upon request, release portions of the mortgaged premises, from time to time, upon receipt of a certain sum per acre, and the mortgagor subsequently sells the land to a third party, who assumes the payment of the mortgage, any subsequent agreement entered into between the grantee and mortgagee, or his successors in interest, whereby the clause as to the release is stricken from the mortgage, will operate as a release of the grantor from all liability for any deficiency arising in a sale of the mortgaged premises, whether the change on the mortgage contract was in fact prejudicial to the grantor or not.<sup>2</sup> So, if the holder of a mortgage, with knowledge that the grantee of lands purchased them subject to the mortgage and assumed its payment, enters into a valid agreement with such grantee for an extension of the time of payment of the mortgage debt, without the consent of the grantor, the latter will be discharged from all liability to the holder of the mortgage.<sup>3</sup>

The cases hold that where the mortgagor conveys to a third party, who assumes the mortgage, the relation of principal and surety arises between the mortgagor and his vendee, and that after notice of this relation, the mortgagee is bound to observe it, and abstain from any act to the prejudice of the mortgagor, or which would impair his recourse against the mortgaged premises in case he should be obliged to pay his bond and be subrogated to the mortgage. The mortgagee, in such case, cannot, after notice, with impunity, release the land or do any other act to the prejudice of the mortgagor ; and the prohibited

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<sup>1</sup> *Paine v. Jones*, 14 Hun, 577 ; S. C. 76 N. Y. 274.

<sup>2</sup> *Id.*

<sup>3</sup> *Calvo v. Davies*, 8 Hun, 222 ; 73 N. Y. 211.

acts are to be determined by the law of principal and surety. But the relation of debtor and creditor between the mortgagor and mortgagee cannot be destroyed by any act of the mortgagor alone, when the mortgage is given to secure the bond of the mortgagor. The courts have gone no further than to hold that the relation of creditor and principal debtor is so far affected that the mortgagee is bound, after notice of the equitable rights of the mortgagor, to respect them and do no act to their prejudice.<sup>1</sup> Knowledge of the relation of principal and surety between the grantor and grantee may be either actual or constructive. A deed by which the grantee of lands assumes the payment of an existing mortgage, is notice to a subsequent holder of the mortgage of the relation.<sup>2</sup>

Merely accepting a deed with full covenants, and with a *habendum* clause in the usual form, followed by the words "subject, nevertheless, to a certain mortgage," &c., "which has been estimated as part of the consideration money of this conveyance, and has been deducted therefrom," does not render the grantee personally liable for the payment of the mortgage in the absence of other words importing that the grantee assumes the payment of the mortgage debt.<sup>3</sup> But the acceptance of a deed containing a statement that the grantee is to pay off an incumbrance, binds him as effectually as though the deed had

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<sup>1</sup> *Marshall v. Davies*, 78 N. Y. 414.

<sup>2</sup> *Calvo v. Davies*, 8 Hun, 222. If the deed to the purchaser contains a condition that he is to pay a prior mortgage, this will be notice to all persons holding under his title, and they will take it subject to the same equity; and it makes no difference whether the title from the purchaser is by direct grant or upon the foreclosure of a mortgage given by him. *Russell v. Pistor*, 7 N. Y. 171.

<sup>3</sup> *Belmont v. Coman*, 22 N. Y. 438. See *Thayer v. Torrey*, 37 N. J. Law, 339.



been *inter partes* and had been executed by both grantor and grantee.<sup>1</sup>

In accordance with the principles before stated, a grantee of mortgaged premises, who has purchased subject to a mortgage for which his grantor was personally liable, and has assumed the payment of the mortgaged debt as part of the consideration, is personally liable to the mortgagee for the deficiency, in an action to foreclose the mortgage,<sup>2</sup> or may be held liable in an action brought against him to recover the mortgage debt without any attempt to foreclose the mortgage, and without joining the mortgagor as defendant.<sup>3</sup> But a stipulation in a mortgage, whereby the mortgagee assumes and agrees to pay a prior mortgage on the premises, does not impose upon the mortgagee a personal liability for the prior mortgage debt which can be enforced against him by the prior mortgagee.<sup>4</sup>

In New York, at least, the doctrine of the personal liability of a grantee of mortgaged premises for the mortgage debt, is confined to cases in which the grantor was personally liable for the debt assumed by the grantee. If the owner of lands executes a mortgage thereon, and subsequently conveys the premises so incumbered to a third party, who does not assume the payment of the debt, and the third party again conveys the premises to another, who does assume and agrees to discharge the debt as part of the consideration of the conveyance, the mortgagee cannot hold the last grantee of the prem-

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<sup>1</sup> Trotter v. Hughes, 12 N. Y. 74; Belmont v. Coman, 22 N. Y. 438; Atlantic Dock Co. v. Leavit, 54 N. Y. 35; Crawford v. Edwards, 33 Mich. 354.

<sup>2</sup> Miller v. Thompson, 34 Mich. 10.

<sup>3</sup> Burr v. Beers, 24 N. Y. 178; Thorp v. Keokuck Coal Co. 48 N. Y. 253; Lamb v. Tucker, 42 Iowa, 118; Schlatre v. Greaud, 19 La. Ann. 125; Thompson v. Bertram, 14 Iowa, 476. But see Mason v. Barnard, 36 Mo. 384.

<sup>4</sup> Garnsey v. Rogers, 47 N. Y. 233.

ises liable for any deficiency arising on the sale of the premises under foreclosure.<sup>1</sup> As the grantee of lands subject to a mortgage which he assumes and covenants to pay, stands, in respect to such lands, in the position of the principal debtor, and a grantor, who is also the mortgagor, stands in the position of a surety, the release of the mortgagor, under such circumstances, from all liability for the mortgaged debt, is a mere personal discharge, and does not discharge the mortgage security.<sup>2</sup> A discharge of a mere surety never operates as a discharge of the principal debtor.

Where lands are purchased subject to a mortgage which the grantee does not assume or agree to pay, the grantee does not become the principal debtor, nor does the mortgagor become his surety. The land conveyed, however, becomes the primary fund for the payment of the mortgage debt, and in case the mortgagor pays the debt, he will, in equity, be subrogated to the rights of the mortgagees. But these rights belong to him, not because he is a surety, but because he has discharged a debt which is a lien upon land conveyed by him subject thereto, and it is but just and equitable, that, having paid the debt for which the land is primarily bound, he should be substituted in the place of the creditor, and succeed to his rights. If the mortgagee enters into an agreement with the grantee, extending the time of the payment of the mortgage, he does not thereby release the mortgagor from his liability upon the bond executed at the time of

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<sup>1</sup> *Vrooman v. Turner*, 69 N. Y. 280; S. C. 25 Am. R. 195; *King v. Whiteley*, 10 Paige, 465; *Trotter v. Hughes*, 12 N. Y. 74.

<sup>2</sup> *Bentley v. Vanderheyden*, 35 N. Y. 677; *Tripp v. Vincent*, 3 Barb. Ch. 613; *Richmond v. Aiken*, 25 Vt. 324. But a mortgagee who diminishes the security of a second mortgagee, by releasing the mortgagor's personal liability, if he does not absolutely discharge the premises from the lien of his mortgage, at least subordinates his lien to that of the second mortgagee. *Sexton v. Pickett*, 24 Wis. 346.

giving the mortgage, as would be the case if the grantee had assumed the payment of the mortgage, and thus created the relation of principal and surety between the grantee and his grantor.<sup>1</sup>

Where two persons jointly purchase premises incumbered by mortgage, and assume the payment of the mortgage as part of the purchase-money, and one of the purchasers is guilty of laches in discharging his portion of the mortgage debt, the other may either pay the whole debt, take an assignment of the mortgage and be substituted in the place of the mortgagee, or he may pay the half which it is his duty to pay, and, on application to a court of equity, compel his co-purchaser to pay the remainder.<sup>2</sup> If one of such purchasers pays his share only, and the remainder of the mortgage debt is unpaid, the whole of the premises are liable to be sold for the payment of the mortgage, but a court of equity will direct that the interest of the other purchaser be first applied to the satisfaction of the mortgage, as equity regards the lien of the mortgage upon the interest of the party who has paid his share of the debt as in the nature of security for the debt of his co-purchaser.<sup>3</sup>

In determining the rights and liabilities of grantors and grantees of mortgaged premises, it will be observed that it is not proper to apply the terms "surety" and "principal debtor" in all cases to the parties themselves instead of to the property charged with the debt. The application of the principles of suretyship to sales of incumbered lands has not been so far extended as, in all cases, to charge the purchaser of incumbered lands with a liability that, before the conveyance, attached to the land

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<sup>1</sup> *Penfield v. Goodrich*, 10 Hun, 41. See *Kinnear v. Lowell*, 34 Me. 299; *Baker v. Terrell*, 8 Minn. 195.

<sup>2</sup> *Cornell v. Prescott*, 2 Barb. 16.

<sup>3</sup> *Cornell v. Prescott*, 2 Barb. 16; *Williams v. Perry*, 20 Ind. 437.

only. The lands purchased may occupy a position similar to that of a principal debtor in ordinary contracts of suretyship, while the purchaser of the lands will occupy no such position. Thus, if a mortgagor conveys part of the mortgaged premises subject to the whole mortgage, the part sold is first liable for the debt, and this land, so conveyed, and not the purchaser of the land, becomes the principal debtor, and the mortgagee must exhaust this land before he can seek other property of the mortgagor, who has become in equity the surety.<sup>1</sup> If, however, the purchaser had assumed the payment of a mortgage debt, for which his grantor was personally liable, he would have become the principal debtor; and while the mortgagee might foreclose the mortgage and recover the deficiency, if any, from the purchaser, he might also maintain an action directly against the purchaser to recover the amount of the mortgage debt without resorting to the

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<sup>1</sup> *Halsey v. Reed*, 9 Paige, 446; *Colgrove v. Tallman*, 67 N. Y. 95, 98.

In the case of *Briscoe v. Power* (47 Ill. 447), the court, in discussing the right to have mortgaged premises sold in the inverse order of alienation, says: "We held in the case of *Inglehart v. Crane* (42 Ill. 261), that where a mortgagor sells the mortgaged premises in parcels at successive periods, the different parcels should be subjected to the payment of the mortgage in the inverse order of their alienation. That rule rests upon the reason that where the mortgagor sells a part of the mortgaged premises without reference to the incumbrance, purporting to convey the fee simple, and retaining part himself, it is equitable as between the mortgagor and his grantee, that the part still held by the mortgagor should be first subjected to the payment of the debt; and this equity having attached to the land, a subsequent purchaser from the mortgagor, with notice, takes it subject to the same equity. But it is evident that this reasoning has no application to a case like the present, where the first purchaser expressly takes subject to the mortgage. In such case the purchaser has no equity as against the mortgagor, that the portion still held by the latter shall be first applied to the payment of the incumbrance, and having no equity against him of course has none against his grantee. The first purchaser by taking expressly subject to the mortgage, consents that the land conveyed to him shall remain subject to its pro rata share of the debt."

land.<sup>1</sup> It is by the assumption of the mortgage debt and the covenant to pay it, and not the mere purchase of incumbered lands, that the purchaser becomes a principal debtor.

Where several lots have been mortgaged and are subsequently sold to different purchasers, if the mortgagee, with notice of the alienation sufficient to put him on inquiry, releases one or more of the lots so conveyed, he cannot enforce against those not released, more than a proportionate amount of the mortgage debt.<sup>2</sup> The reason is that the parcels sold have become as sureties for the parcels not sold. The latter are as principals. A release of them is a release of a principal debtor, which discharges the surety.<sup>3</sup>

So far the rights and liabilities of grantors and grantees of mortgaged premises have been considered with reference to an assumption of the entire mortgage debt. There may be cases in which the liability assumed will not go to the entire debt. Thus, if the purchaser of real estate, subject to a mortgage, as part of the consideration, assumes a portion only of the mortgage debt, the amount so assumed will become the personal debt of the purchaser, and if he makes a general payment on the mortgage, the law will apply that payment in discharge of the amount assumed, and not to the residue.<sup>4</sup>

Generally speaking, on a conveyance of a part of

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<sup>1</sup> *Miller v. Thompson*, 34 Mich. 10; *Lamb v. Tucker*, 42 Iowa, 118; *Burr v. Beers*, 24 N. Y. 178; *Ricard v. Sanderson*, 41 N. Y. 179; *Thorp v. Keokuk Coal Co.* 48 N. Y. 253. As to whether the mortgagor can subsequently release his grantee from the liability so assumed. See *Stephens v. Casbacker*, 8 Hun, 116; *Hartley v. Harrison*, 24 N. Y. 170; *Garnsey v. Rogers*, 47 N. Y. 242; *Simson v. Brown*, 6 Hun, 251.

<sup>2</sup> *Stevens v. Cooper*, 1 Johns. Ch. 425; *Howard Ins. Co. v. Halsey*, 8 N. Y. 271. See *Guion v. Knapp*, 6 Paige, 35.

<sup>3</sup> *Colgrove v. Tallman*, 67 N. Y. 95, 98.

<sup>4</sup> *Snyder v. Robinson*, 35 Ind. 311; s. c. 9 Am. R. 738.

mortgaged premises, the portion retained is primarily liable for the payment of the mortgage debt. But, if by the terms of sale, the mortgage is to remain a charge upon the whole lands incumbered, and is to be paid by the mortgagor and purchaser without any specific agreement as to the proportion which each one is to pay, each must contribute according to the relative value of the part he owns.<sup>1</sup>

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<sup>1</sup> *Hoy v. Bramhall*, 4 C. E. Green (N. J.), 74, 563.

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